

TAPING WIRE OR ORAL COMMUNICATIONS

HEARING BEFORE THE SUBCOMMITTEE ON CRIMINAL LAW OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2669

A BILL TO PROHIBIT GOVERNMENT EMPLOYEES FROM SECRETLY
TAPING CONVERSATIONS WITH OTHERS

JUNE 13, 1984

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TAPING WIRE OR ORAL COMMUNICATIONS

WEDNESDAY, JUNE 13, 1984

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Paul Laxalt (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Specter.

Staff present: Bill Miller, general counsel; Ellen Broadman, minority chief counsel; Debbie Murdock, chief clerk; and Alexandra Wheeler, staff assistant.

OPENING STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA, CHAIRMAN, SUBCOMMITTEE ON CRIMINAL LAW

Senator LAXALT. The subcommittee will be in order.

On behalf of the Subcommittee on Criminal Law, I welcome all of you to this hearing on S. 2669, a bill to prohibit Federal employees from secretly tape-recording conversations with others.

The bill was introduced by Senator Metzenbaum and was cosponsored by Senator Bumpers. I welcome both of these distinguished Members of the Senate to the hearing this morning. Welcome, Senator Bumpers.

Senator BUMPERS. Thank you, Mr. Chairman.

Senator LAXALT. I look forward to hearing your statement and any comments you may have on this legislation, and I invite both of you to participate in the hearing as long as your schedules will permit.

In addition to the sponsors of S. 2669, we also have with us a roster of excellent witnesses who will lend their expertise and experience to the deliberations of this subcommittee.

The proposal before us covers only an official, employee, or agent of the United States or of any department or agency thereof, while acting in his or her official capacity. It is therefore appropriate for us to hear from representatives of several of the Federal departments and agencies that will be affected by this legislation. Because the impact of this measure will not be the same on each segment of Government, the witnesses appearing today will discuss different aspects of the bill.

From the Department of Justice, we shall hear from Mary Lawton, Counsel for Intelligence Policy, and Victoria Toensing, Deputy Assistant Attorney General for the Criminal Division and

formerly chief counsel of the Senate Select Committee on Intelligence. It is my understanding that these witnesses are also prepared to convey to the subcommittee the concerns of the intelligence community.

We shall also hear from Robert McBrien, Deputy for Security Affairs and Crisis Management in the Office of Enforcement and Operations at the Treasury Department. And from the General Services Administration, Frank Carr, the Assistant Administrator for Information Resources Management, will discuss the bill from the perspective of the agency that plays a large role in the existing regulations regarding telephone taping by Federal employees.

Finally, we shall hear from a panel of witnesses that includes Dennis Hays, the president of the American Foreign Service Association, and two professors of law: Prof. Herman Schwartz of the Washington College of Law of American University, and Prof. Leon Friedman of the Hofstra University Law School. Professor Friedman is representing the American Civil Liberties Union at this hearing.

I welcome all of the witnesses who are with us this morning.

Before we begin the hearing, it may be helpful to describe, as I understand it, the problem to which this legislation is addressed and to indicate the types of questions that the bill poses.

We have all heard of instances recently where Federal officials have tape-recorded telephone conversations and other conversations taking place in their offices without notifying the other parties of the recording. This practice, when it is not done for a legitimate law enforcement, intelligence gathering, or other acceptable purposes, is repugnant to the chairman, and I am sure it is to each of us here today.

I do not accept the reasoning, sometimes heard in such cases, that if we have nothing to hide, then we should not be angry or worried that someone recorded our conversations. We should not allow our laws and governmental actions to instill in each person the expectation that any or all of his conversations with a Government employee will be taped. Secret taping is an affront to human dignity. It is a violation of the mutual respect we all assume when we informally, and even formally, converse with others.

But it is still an open question for me whether the proper way to address this problem is to make such conduct a crime. I question whether it is not preferable to deter secret taping by civil law remedies and administrative regulation. If it is shown today that these alternatives are not presently succeeding, then perhaps Congress should focus its attention on strengthening the statutes that authorize these noncriminal sanctions.

Making the conduct in question a crime also raises two other points of study. First, can we make the statute reasonably enforceable? It seems to me that the typical investigation into an alleged case of secret taping would have to start with the suspicion of the taped party. This surely seems to me to be a slim basis upon which to bring a criminal investigation. Yet, if this were not the basis, the statute would seem relatively easy to evade.

A second problem is closely related to this one. Namely, a criminal sanction against such conduct may be subject to abuse. Perhaps I am suffering from election year skepticism, but it seems to me

that a criminal statute might serve as an excellent means to call for criminal investigations, and all of the negative publicity that they entail, of members of the existing administration and for that matter, the existing Congress.

Finally, I would simply caution those who set about drafting a secret taping statute of the difficulty of fashioning a general rule that is based upon one or two well-known instances of objectionable conduct. This is especially true when the statute must be made part of an intricate statutory scheme.

As one reasonable exception after another is carved out of the rule, we may well reach the point where the rule is so narrow that it is an empty gesture—a good symbol, perhaps, but not a sound law.

As I say, I have not yet made up my mind on either this particular bill, or on the general principle of making secret taping by Government employees a criminal offense.

I look forward during the course of this hearing to learning enough information from the various witnesses before us today to resolve some or all of the concerns I have outlined.

Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Mr. Chairman, I first want to thank you and commend you for taking your time—we all know that you are a very busy man—to set up this hearing, and to be willing to explore the entire issue. From your opening statement, it is obvious that you yourself have given the matter considerable thought, and I think that you have laid down the challenge to us who support the legislation, or some amendment thereof or some modification thereof, to make out our case as to why a law is necessary rather than departmental regulation.

We do appreciate this opportunity to explore that issue with you.

This legislation which Senator Bumpers and I introduced will actually close a loophole in the Omnibus Crime Control and Safe Streets Act of 1968 that permits Federal officials to secretly tape their telephone conversations with others.

Now, why is this legislation needed? Because secret taping of telephone calls by Government officials is a clear infringement on the fundamental right to privacy of the people of this country. As New York Times Columnist William Safire has observed, this practice is "an offense against good Government."

The Federal government itself apparently concurs with that judgment. Since March 31, 1981, we have had in effect a regulation issued by the GSA, the agency whose responsibilities include promulgating and overseeing compliance with regulations governing telecommunications management and listening in and/or recording of telephone conversations.

The regulation states explicitly that "listening in and/or recording, stenographically or on tape, of telephone conversations is only permissible with the consent of all parties for each specific instance."

Mr. Chairman, that regulation might just as well never have been written.

Why?

As noted in a report by the staff of the House Committee on Foreign Affairs, entitled "Recording of Telephone Conversations" by Charles Z. Wick, Director, USIA, "The current regulation does not establish specific procedures for effective oversight by the agency in question (USIA), GSA, or any other government body to insure compliance."

The GSA regulation is, in other words, a toothless tiger—so much so that, even though he had been informed by USIA counsel of its existence, Mr. Wick felt free to proceed with secret taping. He explained subsequently that the GSA regulations "carried no sanction, and on that basis, I frankly did not regard them as a legal constraint."

Frankly, Mr. Chairman, that is quite a statement. In effect, it says that the rules are not the rules unless a person can be punished for breaking them. And I must say, Mr. Chairman, that I very much wish that Mr. Wick were with us today at this hearing, but unfortunately, he seems to believe that he has little to contribute to our deliberations. I specifically invited him to join us here today. In an undated letter delivered to me on Monday, June 11, which I ask be made a part of the record, Mr. Wick said this about his absence: "I must point out that I do not have the authority or competence to speak for the administration on the complex law enforcement issues raised by the legislative proposal to make telephone taping a Federal crime."

Now, that may be so, Mr. Chairman, but I for one did not want to hear from Mr. Wick about the technicalities of law enforcement. Instead, I was interested in his expanding upon the points he made on January 10, 1984, when he said, "I now understand that taping of others without their consent is unfair, invades their privacy and can lead to other, more dangerous practices."

Now, I wonder, how did he arrive at that understanding, and what, specifically, are those "other," more dangerous practices?

But, disappointment aside, the fact is that Mr. Wick was not alone in ignoring the GSA regulations. Of 72 agencies surveyed recently by the House Government Operations Committee, only 16 have fully implemented these 3-year-old regulations. Only half have issued any policy guidance at all on secret taping. And the rest? The rest had done precisely nothing.

The bill before us today is designed to get the attention of the Federal bureaucracy. And I might say, parenthetically, that some question has been raised as to whether or not the bill, by its terms, does or should include restrictions with respect to those of us who are members of the Congress as well as members of the judiciary, and I certainly would think that we should be included, and the judiciary, as well, and I certainly intended, and I am sure that Senator Bumpers intended, no exception.

The bill clearly prohibits secret taping by Federal officials acting in an official capacity. It has teeth, but not overly strong teeth. Violators would be subject to criminal penalties of up to \$1,000 and up to 6 months' imprisonment.

And finally, the bill includes exemptions that permit taping for purposes of legitimate law enforcement, investigative, security, foreign intelligence and counterintelligence activities. If representatives of the Government can come forth to make a logical and legitimate case for additional exemptions, so that the normal pursuits of governmental responsibilities can be pursued, I am certain that we would be receptive to carving out a further exception for those activities.

It would also permit taping of criminal or tortious conversations—that is, death threats, for example—and would authorize the Attorney General to create other appropriate exemptions.

Nineteen States have already enacted legislation to restrict secret taping of telephone calls. They include: Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Washington, and Wyoming.

On the Federal level, we seem to be behind the times. But that is changing. Legislation is moving in the House. On April 10, the House Government Operations Committee reported a bill similar to the one before us today.

I think there is wide agreement that when law-abiding citizens call their government officials, they should be able to do so freely, without fear that their words are being recorded and their confidences are being betrayed. And I hope that when these hearings are concluded, we will move quickly to afford our citizens the protection they so much deserve.

I thank you, Mr. Chairman.

[The text of S. 2669 follows:]

98TH CONGRESS
2D SESSION

S. 2669

To prohibit Government employees from secretly taping conversations with others.

IN THE SENATE OF THE UNITED STATES

MAY 14, 1984

Mr. METZENBAUM (for himself and Mr. BUMPERS) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit Government employees from secretly taping
conversations with others.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 119 of title 18, United States Code, is
4 amended by adding after section 2511 the following new sec-
5 tion:

6 "§ 2511A. Prohibition on taperecording by Government officials

7 “(a) No official, employee, or agent of the United States
8 or of any department or agency thereof, while acting in his or
9 her official capacity, shall intercept or authorize another
10 person to intercept a wire or oral communication to which

1 such person is a party, notwithstanding the provisions of
2 paragraphs (c) and (d) of section 2511, and subject to subsec-
3 tion (b) of this section. Anyone who violates this section shall
4 be fined not more than \$1,000 or imprisoned not more than
5 six months, or both.

6 “(b) Subsection (a) shall not apply if—

7 “(1) all parties to the communication have given
8 prior consent to such interception;

9 “(2) the person intercepting the communication
10 is—

11 “(A) an investigative, law enforcement, secu-
12 rity, foreign intelligence, or counterintelligence of-
13 ficer acting within the normal course of his or her
14 employment; or

15 “(B) performing a law enforcement, security,
16 foreign intelligence, or counterintelligence function
17 under the direction and control of an officer de-
18 scribed in subparagraph (A);

19 “(3) the person intercepting the communication is
20 acting in accordance with—

21 “(A) regulations approved by the Attorney
22 General; or

23 “(B) guidelines approved by the Attorney
24 General, if the Attorney General determines that

1 there is a compelling governmental interest in not
2 making the guidelines public; or

3 “(4) the communication constitutes a tortious or
4 criminal act or threatens to perform a tortious or crimi-
5 nal act.

6 In making a determination whether to allow the interception
7 of a communication under clause (3), the Attorney General
8 shall consider and balance the right to privacy of the parties
9 to the conversation and the interest of the Government in
10 breaching such privacy.”.

11 (b) The table of sections for chapter 119 of title 18,
12 United States Code, is amended by adding immediately after
13 the item for section 2511 the following:

“2511A. Prohibition on taperecording by Government officials.”.

14 (c) The amendments made by this Act shall be effective
15 60 days after the date of enactment of this Act.

Senator LAXALT. I thank the Senator.

I think perhaps at this point, the Chairman should indicate that it was his decision not to call Mr. Wick to this hearing. He has testified at length before at least three congressional subcommittees, and I frankly felt that his testifying here again, since those records are freely available, would not add anything significantly to the deliberations of this subcommittee.

Senator Bumpers.

**STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM
THE STATE OF ARKANSAS**

Senator BUMPERS. Mr. Chairman, let me add my voice to that of Senator Metzenbaum in thanking you for holding this hearing, and to say also that I was particularly impressed with your opening statement. I have even taken a derogatory statement about the President out of my statement as a result of that.

Mr. Chairman, thank you for inviting me.

The subject this morning, of course, is the protection of the privacy of communications of every American from secret monitoring and recording by unauthorized Government officials.

The Founding Fathers knew about the right to privacy in one's communications because they included in the Bill of Rights the fourth amendment's admonition that there be no unreasonable searches and seizures, and further, that no warrant shall issue but upon probable cause.

Our Founding Fathers knew only too well from personal experience that a government of unbridled authority could and would show little deference to our longstanding value in Western civilization, which is embodied in the phrase, "A man's home is his castle."

We have been reminded just recently of the Government's proclivity to undermine the right of privacy by this egregious abuse of public trust which has just been discussed here this morning. That, of course, is the revelation in the New York Times by William Safire of Mr. Wick's at least unethical, if not unlawful, recording of conversations without telling the other party.

Mr. Chairman, I also want to commend Senator Metzenbaum for being among the first to offer a legislative response to this highly offensive and dangerous practice by high-ranking Government officials.

There are undoubtedly a number of legislative responses which could be made. During debate on the omnibus crime control package in February of this year, Senator Metzenbaum and I joined in offering an amendment substantially similar to the bill which is the subject of these hearings. I must say, I am still at a loss to understand why the administration opposed that amendment so vociferously. I suppose it is understandable, from a political standpoint, that the President would not want Congress to act in response to an embarrassing gap by a close personal associate. But that does not seem to me to be a legitimate basis for legislative inaction, particularly when almost everybody agrees that such conduct by Government officials is highly improper and ought to be made illegal.

As a prefatory matter, I would say that Mr. Wick's actions have now been thoroughly investigated by the staff of the Foreign Relations Committee and spread upon the public record.

Incidentally, I have had Mr. Wick in my office and have had lengthy conversations with him. He is a perfectly engaging man and a nice man, and I think he seems to me to be rather remorseful about his conduct.

The Foreign Relations Committee staff report makes clear that the USIA's General Counsel advised Mr. Wick, though, as early as December of 1981 that the tape recording of phone conversations without the consent of all parties violated GSA regulations. Yet Mr. Wick proceeded, his counsel's advice to the contrary notwithstanding. Other members of his staff also expressed personal and professional reservations about the Director's conduct, and yet he persisted until it was revealed by William Safire as to what he was doing.

The responses to that revelation are now well known by everybody here. Members of Congress and the public were outraged. The President, unhappily, was not as outraged so far as I can see, and has so far even declined to reprimand the Director. I cannot believe, though, that the President thinks it is all right for Government officials, whether they be Members of Congress, regulatory bureaucrats, or the President himself, to go about routinely and secretly recording conversations with other citizens without those conversations with those citizens or other Government officials being revealed.

Therefore, Senator Metzenbaum and I put our heads together and did our very best to persuade the Senate last February to make such conduct illegal. Since then, we have worked further to refine and improve that amendment into the form in which it appears today.

We have, I might add, made every effort to satisfy every legitimate objection which has been voiced by those in the law enforcement, security, and intelligence communities.

Before addressing the specifics of the Metzenbaum/Bumpers bill, however, I would like to emphasize that this legislation, in my judgment, should only be a part of congressional efforts to protect the integrity of personal communications. We must begin by looking briefly at the present state of the law.

Most Americans, I think, if you were to ask them about Mr. Wick's conduct, would consider it to be at least a misdemeanor, if not a felony. We are indebted to Mr. Wick for at least one thing, and that is for having brought to our attention that such is not the case. In fact, current Federal law provides essentially that it is illegal for anybody to intercept a telephone conversation, and "intercept" is defined by the statute to include recording, unless one party—unless one party—to the conversation gives consent, and the consenting party can be the one who is doing the recording. In other words, it is illegal secretly to tape record a conversation unless you want to.

In fairness to the drafters of this statute, I should add that it is nonetheless still illegal, if the communication is intercepted for the purpose of committing any criminal or tortious act.

So, while the law is not entirely meaningless, it does not seem to me to have any teeth.

In Mr. Wick's case, the committee staff was unable to find evidence of an illegal purpose which would support a criminal prosecution. So if the secret tape recorder, which I have referred to from time to time as the moral equivalent of a "peeping tom", is merely recording for the sake of having meticulous records of what everybody says, or for future reference, as the saying goes, no prosecution will lie. I do not believe the Government or any private party, for that matter, has any business recording people's statements without their consent. So, on January 24, 1984, I introduced S. 2205, which would very simply amend the present statute by requiring the consent of all parties to the conversation before a recording could take place. After studying section 2511 of title 18, I decided that this was the simplest and most direct way to deal with the problem: Simply to change one party consent to all party consent.

I am still persuaded that this is a basic, sound approach. That bill, Mr. Chairman, has been jointly referred to this committee and to the Subcommittee on Patents, Copyrights and Trademarks, and I hope these subcommittees will see fit to hold hearings on it before this session ends.

My bill, which is cosponsored by Senators Rudman, Randolph, Riegle, Huddleston, Melcher, Burdick, Eagleton, and Dixon, is broader in scope than the bill now before this committee, in that it would reach private conduct as well as that of Government officials.

I am persuaded that private parties generally have no more business secretly recording conversations than do officials of the Government. Some groups have raised objections to my bill, and I am prepared to work with those groups, such as the telephone industry itself, licensed private investigators and others, in working out whatever problems may exist.

The upshot of all these proposals, Mr. Chairman, is that there are those in Government and perhaps out of Government who have a legitimate interest in tape recording telephone conversations. These obviously include law enforcement agencies at all levels, and of course, our national intelligence gathering community. None of us wants to upset or in any way weaken the present provisions of law which will allow these agencies to do their jobs.

There are, on the other hand, countless Federal bureaucrats such as Mr. Wick who have nothing whatsoever to do with law enforcement or national security, and who simply have no business under what most of us would consider a reasonable expectation of privacy, secretly recording what citizens tell them over the phone in the privacy of their offices.

Let me also say at this point, Mr. Chairman, that I have gone back and looked at the Congressional Record from 1968 in an effort to determine how the Senate arrived at the present provisions of law, and it presents an interesting legislative history. It appears in the debate over the Omnibus Crime Control Act of 1968 that Senator Philip Hart brought to the Senate's attention a serious oversight in the bill as drafted by the Judiciary Committee. The bill as drafted would have allowed one-party consent for the surreptitious

monitoring of conversations in all cases, so leaving wide open the problem of "industrial espionage and many other abuses of the right of privacy."

Senator Hart offered a substitute, which was apparently accepted by Senator McClellan, which essentially prohibited one-party consent taping where a criminal or tortious purpose could be shown. Now, that is the present law. While Senator Hart, certainly one of the greatest and most perceptive Members ever to serve in this body, was correct in pointing up a serious flaw, the provision which was agreed to leaves open the case such as Mr. Wicks, where a bad motive cannot be proven, but the eavesdropper simply has no business doing what he has done.

In the case of Government officers and employees, it is especially clear to me that no criminal purpose should have to be demonstrated in order for us to say that the conduct is wrong. Officers of the Government simply have no business secretly taping conversations, as we say in Arkansas, "just to be a'doin'."

Senator Metzenbaum's and my bill will stop those who would secretly tape "just to be a'doin'."

Senator Metzenbaum has prepared this carefully drafted bill to reach exactly those people, while protecting the power of law enforcement and of intelligence and counterintelligence agencies to conduct such activities as the exigencies of their work and present law allows. In fact, Senator Metzenbaum has gone even further—perhaps, further than I would personally prefer to go—by allowing the Attorney General to draft regulations or guidelines to allow this form of wiretapping by others who might conceivably have a legitimate governmental interest, but who have been overlooked in our previous efforts.

Frankly, I was astonished that the Justice Department opposed our amendment in February, and I cannot see how they could possibly oppose this bill now, given the tremendous leeway which the bill gives them. In fact, I look forward to their testimony this morning in support of this salutary legislation.

Let me close, Mr. Chairman, by saying that I recently had the privilege of testifying before the House Subcommittee on Criminal Justice in support of similar legislation offered in that body by Congressman Conyers. I am hopeful we can move this bill in the Senate, and that the House will move on its legislation, and that we can look forward to a conference and a major piece of legislation which will protect the privacy of Americans.

Again, Mr. Chairman, I want to thank you and this subcommittee for allowing me to testify this morning.

Senator LAXALT. I thank the Senator for a very excellent statement. What you have had to say this morning will help greatly in the deliberations of the subcommittee.

Senator Metzenbaum.

Senator METZENBAUM. No questions. Thank you.

I commend the Senator from Arkansas for an excellent statement.

Senator BUMPERS. Thank you very much.

Senator LAXALT. We now have a panel consisting of Mary Lawton, Victoria Toensing, J. Robert McBrien, and Frank Carr.

I understand that Victoria Toensing has a time press, and I would be perfectly willing to hear her first out of the panel so that she may feel free to leave thereafter.

STATEMENT OF A PANEL, INCLUDING: VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; MARY C. LAWTON, COUNSEL FOR INTELLIGENCE POLICY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, DEPARTMENT OF JUSTICE; J. ROBERT McBRIEN, DEPUTY FOR SECURITY AFFAIRS AND CRISIS MANAGEMENT, ENFORCEMENT AND OPERATION, DEPARTMENT OF THE TREASURY, AND FRANK CARR, ASSISTANT ADMINISTRATOR, OFFICE OF INFORMATION RESOURCES MANAGEMENT, GENERAL SERVICES ADMINISTRATION

Ms. TOENSING. Good morning, Mr. Chairman.

Thank you for asking me to testify regarding S. 2669, which criminalizes for only Federal employees the intercepting of oral or wire communications.

The Department of Justice strongly opposes this legislation for two main reasons. It unnecessarily burdens law enforcement since there are presently GSA regulations in effect, and it unreasonably discriminates against Federal employees.

Before I discuss these points, I want to outline briefly where the law is presently regarding interception. The Federal Criminal Code now covers intercepting communications in some detail in title 3, the 1968 Omnibus Crime Bill. The term, "intercept," is defined as the oral acquisition of the contents of any wire or oral communications through the use of any electronic, mechanical, or other device. It is a very broad definition, Senator. It applies to any recording or listening in of any oral conversation, including one to which the person doing the listening in or the recording is a party to the conversation.

Congress recognized that this definition is very broad, and in light of that, they provided two principal exceptions. The first is for a person acting under color of law. It is not a crime if that person is a party to the conversation, or a party to the conversation gives consent to listen in or record. The second exception is for a person not acting under color of law, and it is not a crime if he or she is a party to the conversation and has given consent, unless that interception is for the purpose of committing a criminal act or a tort.

In sum, title 3 says that there is no legal violation, no criminal violation, when one-party consensual intercepts occur unless the person is not acting under color of law and is doing it for a criminal or tortious reason.

Let me explain, Mr. Chairman, why I think that this legislation is impossible to make criminal. We are taking one type of conduct, the intercepting of one's own conversation, and in one situation, on one hand, we are making it criminal; and yet, on the other hand, this very same conduct is necessary and vital for certain parts of government to function—for instance, intelligence, law enforcement, and security operations. And so for some people, we are saying, "You cannot do it or you may go to jail," and for other per-

sons, we are saying, "You had better do it, or you are not performing what we expect of you in government."

It is for that reason that we feel this legislation burdens law enforcement. And since there are GSA regulations in effect for the executive branch, this burden is unnecessary.

Senator LAXALT. What do you say to the argument that has been propounded by my colleagues to the effect that while the regs are in place, they are practically meaningless because they cannot be implemented?

Ms. TOENSING. Well, I do not agree with that House Government Operations Report. I looked at that report, and I do not know if you have the chart available, Senator, but this was the Government operations decision that agencies were not in compliance. For instance, the report stated the Commerce Department was not in compliance. I called the general counsel's office, and they said yes, they were; they did not understand why the House report said they were not in compliance. I called the CIA, which is shown as not in compliance. But the CIA is exempt from that GSA regulation and has had their own regulations for a good number of years.

Senator LAXALT. You are saying that the report, then, is factually incorrect in some respects?

Ms. TOENSING. At least the ones that I checked on.

Senator LAXALT. Well, what do you do about the Wick situation, where apparently he was advised by counsel that intercepting calls in which he was a party is a violation of the regs, but that there are no sanctions. He then felt, for his own purposes, that there was no harm done in going forward and recording these calls?

Ms. TOENSING. Mr. Chairman, I have two points to make about that. First, I think it is very reassuring that there were so many people who were telling the head of an agency that this was incorrect. I think that shows that we have learned a lot in the last few years. These regulations went into effect in 1981, and here, in 1984, people are saying, "You cannot do that." We have learned a lot. We have developed a sensitivity to this behavior.

The second thing that I would like to say is that Mr. Wick apologized for this. We agree with the chairman that this was improper conduct. There are situations in our lives where people do something that is very insensitive, and we apologize or try to put it back the way it was, and I think we expect people, then, to accept that, and that is what Mr. Wick has done. I feel like I am back in grade school, and somebody talked, and so the teacher kept us all after class.

Senator METZENBAUM. Aren't you making a rather unusual comparison of taping conversations with foreign ambassadors, with prominent people in this country, with national commentators, with—I think I read one place—members of the White House inner circle; I think I read in another place, and I am not positive, but I think I read, his wife's conversations. Don't you think that you are saying that an apology is adequate for a public official who has continuously, actually, flagrantly just disregarded the advice of his own counsel—and I might say at this moment, Mr. Chairman, I would like to suggest that we include in the record a copy of the counsel's advice to Mr. Wick.

Ms. TOENSING. Senator Metzenbaum, as I said, there is conduct in our society that we all condemn. Leaving a spouse with small children to fend for themselves is very poor conduct; betraying a confidence—if I told you something in confidence and said, "Please, don't tell," and you told someone else, I would also think that was reprehensible. But we do not criminalize that.

I think that an approach for professional people is to teach and raise the consciousness of persons who are involved in this. And I feel more reassured that we see so many agencies taking part. I was reassured when I called these different agencies, the Government Operations—

Senator METZENBAUM. How many did you call?

Ms. TOENSING. I called the ones that were said to be not in compliance.

Let me explain the chart as I understand it, because it is not very clear in that report—and Mr. Carr is here from GSA, so he may be able to go into more depth, Senator Metzenbaum. But it appeared that GSA said to the agencies, "If you are going to intercept or monitor conversations, will you please put forward some kinds of regulations."

So I went through the chart and found the agencies that said that they monitored or intercepted, because a good many of them were not in the business of doing that. I checked with those agencies that said that they were in the business of monitoring or intercepting and were held stated as not in compliance. I checked with FEMA because they were told that they were in noncompliance. They said that they were in compliance, that they had put out instructions in 1982, in February or March of 1982.

So I do not know how the House staff derived their information. Commerce said that they were in compliance. As I said, the CIA was held in noncompliance, and yet the GSA regulations do not apply to them, and they have their own regulations. So where the House committee got their information, I do not know, but it does not appear accurate as I checked it out.

Senator METZENBAUM. Didn't they actually conclude that the GSA regulation was not implemented—and as I look at this chart that I have in front of me, there are "N's" next to so many of these agencies that it is just unbelievable. In all fairness, not all of them monitor conversations.

Ms. TOENSING. That is correct, Senator, and that is how I checked them out. The ones that said they were in the business of monitoring or intercepting, and then had an "N" at the end of the chart. I assumed the "N" meant that the Government Operations Committee held them in noncompliance—and I believe I only found four or five of those—

Senator METZENBAUM. What did Amtrak say?

Ms. TOENSING. I did not reach Amtrak yesterday.

Senator METZENBAUM. They are one that, why they would be monitoring conversations is beyond me.

That is all I have.

Ms. TOENSING. As I just said, Senator, the Justice Department supports the method of the GSA regulations. We feel that both procedurally, the use of regulations provides a flexibility, and substantively, these very regulations, these particular ones, provide the

flexibility that is needed when the same conduct under certain conditions is made criminal and under other conditions, is necessary for government to function.

Our second principal objection is that there is discrimination here against the many dedicated Federal employees. Only for them is this conduct of intercepting one's own conversation with another person made criminal. The Department of Justice has assumed that this bill does apply to all three branches of Government, and I have checked with your staff, and I am glad that that was confirmed by you, Senator, this morning.

Senator LAXALT. Is that a correct impression, Senator?

Senator METZENBAUM. Well, there seemed to be some misunderstanding. My staff asked me that yesterday. I indicated that I intended that it cover all three arms of Government, and if we need some legislative language to make that totally clear—

Senator LAXALT. That is essentially your intent.

Senator METZENBAUM. That is my intent.

Senator LAXALT. Is that shared by Senator Bumpers, as well, or do you know?

Senator METZENBAUM. I do not know—yes, it is.

Senator LAXALT. All right. Please continue.

Ms. TOENSING. Thank you, Mr. Chairman.

We certainly agree that if it is a crime for an employee in the Department of Agriculture then it likewise should be a crime for a U.S. Senator or an employee of the Senate.

Senator METZENBAUM. Ms. Toensing—how do you pronounce your name?

Ms. TOENSING. Like "ton" of coal, "sing" a song, Toensing.

Senator METZENBAUM. Toensing. I did not mean to be rude in asking that question, but I have trouble with "Metzenbaum," so do not feel bad.

From your testimony, I get the impression that you actually would be more supportive of the other Bumpers bill, which makes it a crime for anybody to record a conversation without the consent of the other party. Now, is that the Justice Department's position?

Ms. TOENSING. No, Senator. What we are pointing out is how unfairly this bill is written. We say that there should not be criminal penalties for this, and that the GSA regulations are the way to proceed. When you try to make this criminal and at the same time, protect all the other interests that people are concerned about, you begin to push the step-sister's foot into Cinderella's shoe; you begin to have so many problems with it that we see it unravels. And one of these places is the fact that only Federal employees are singled out and discriminated against for this conduct.

If this is such an evil, we do not see how, logically, the proponents of this bill could possibly just say that it is criminal conduct for only Federal employees.

Senator LAXALT. But your essential point, I gather, Ms. Toensing, from your testimony is that this type of conduct should not be criminalized at all, and no one should be affected.

Ms. TOENSING. Absolutely, Mr. Chairman, to provide the necessary flexibility that we must have in Government when we are doing the conduct that is to be criminalized.

And let me point out another problem when you try to accommodate all the concerns in making this conduct criminal.

As we have said, there must be flexibility, there must be many exceptions to this prohibition. This bill attempts to take care of that problem by providing that the Attorney General can approve regulations and guidelines. But the cure is as bad as the problem. What about the separation of powers? Does the Senate mind that the Attorney General writes guidelines and regulations for it?

Senator LAXALT. I do not think that was intended. Is it intended that the AG guidelines would apply to the Members of the Congress or the Judiciary?

Senator METZENBAUM. No, I do not think that that was where we were going on that. I think we were talking about the Attorney General having authority to provide exemptions if he finds it necessary for Federal employees. We are not talking about the Judiciary and the Congress. We were trying to provide that extra leeway so that if the Attorney General found that there was some special reason to have another exemption than that which was included in the legislation, then we would be willing to give him that authority to do so.

Senator LAXALT. But reaching the point that Ms. Toensing indicates, if you are going to have the Attorney General prescribe guidelines which would apply to the other departments of Government, and if your contention is that that would only apply to the executive branch, what do we do about the other two branches?

Senator METZENBAUM. Well, I think that either Congress itself can spell out its own guidelines—I think we are fully capable of making our own guidelines through our Rules Committee or——.

Senator LAXALT. And maybe the administrative conference would do the same for the judiciary.

Senator METZENBAUM. Yes.

Ms. TOENSING. It would seem to me, Mr. Chairman, that would be the preferable way to proceed, that the Senate and the House make regulations—intrabody rules—as has the executive branch, and also encourage the judicial branch to do that.

There are drafting problems. They do not go to the thrust of the bill, but I will point out a couple of the drafting problems.

Senator METZENBAUM. Suffice it to say without your comments that the sponsors of the legislation made it very clear from the inception, if any department of the administration has a problem with the language or the drafting, we are prepared to sit down and try to work that out. I think it is the general thrust of this legislative proposal that concerns us and it disappoints us that the Justice Department has seen fit to take a broadside position in opposition to it. We are not saying that this is a legislative masterpiece and that it cannot be improved upon. In that connection, we are very happy to work with the Department of Justice or any other arm of Government.

Ms. TOENSING. We have joined the chairman and you, Senator, in condemning this behavior and these insensitivities. This type of behavior is not the type that we should criminalize. It begins to make the Criminal Code trivial. There are things that people do in society that are not accepted by society that are condemned by society,

but perhaps the more sophisticated, professional way to proceed is to teach the people about this, and——

Senator METZENBAUM. You are saying that taping another person's conversation without his consent or her consent is trivial?

Ms. TOENSING. I am saying it trivializes the law to make such technical conduct criminal, when there are so many exceptions that have to be made that you stand on your head in working them out.

We are concerned because there is no intent. I know that many times, the Senate has been concerned about having several intent provisions in one piece of criminal legislation. There is no intent provision in this bill, so an inadvertent picking up of the telephone when two people are talking could be criminal activity. There is no discussion as to who bears the burden of proof when fitting into an exception. Usually, in a criminal trial, for an affirmative defense, the defendant bears the burden, as in insanity. In an affirmative defense, the defendant has the burden. There is no discussion of that issue, so every time there is an accusation, the Federal employee must come back to bear the burden in a criminal trial. But overall, Mr. Chairman, what we feel is that this kind of conduct being criminalized unnecessarily burdens law enforcement when we already have the GSA regulations, and it unfairly discriminates against Federal employees.

I will be glad to answer any more questions you might have.

[The prepared statement of Ms. Toensing follows:]

PREPARED STATEMENT OF VICTORIA TOENSING

Mr. Chairman and Members of the Subcommittee, thank you for asking me here today to present the views of the Department of Justice on S. 2669, a bill that would prohibit federal officers and employees from intercepting a wire or oral conversation to which they are a party. The Department of Justice opposes this legislation for two principal reasons: first it would be harmful to law enforcement operations without enhancing privacy interests since there are already regulations in effect, and, second, because it unreasonably singles out federal employees for coverage while leaving unaffected identical conduct by other persons.

BACKGROUND

The criminal code presently covers wiretapping in some detail. Chapter 119 of Title 18, United States Code sets out a complete scheme for regulating the interception of wire and oral communications. Because Chapter 119 was originally enacted as Title III of P.L. 90-351, The Omnibus Crime Control and Safe Streets Act of 1968, the law in this area is commonly referred to as "Title III." The term "intercept" is defined in Title III (18 U.S.C. 2510(4)) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Hence although the word "intercept" normally brings to mind a surreptitious overhearing of a conversation without the knowledge or consent of either party to it, the above definition is so broad that it applies to any recording of a wire or oral conversation including one to which the person making the recording is a party. As you know, Congress gave long and careful consideration to Title III. As a result, Congress provided two extremely important exceptions to making it a crime to intercept aural communications. These exceptions would be greatly altered by this bill.

The first exception under Title III (section 2511(2)(c)) states that it is not unlawful under this chapter "for a person

acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given permission or consent to such interception." The second Title III exception (section 2511(2)(d)) states that it is not unlawful "for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

Thus, Title III (subsections 2511(2)(c) and (d)) exempts one-party consensual interceptions from its prohibitions unless the person making the interception (1) is not acting under color of law and (2) intercepts for a criminal, tortious, or other injurious purpose. Otherwise there is no federal statute that prohibits the secret interception of one's own conversations.

However, and very important to this issue, is the fact that the General Services Administration (GSA), pursuant to its authority to issue government-wide rules relating to the management and disposal of government property set out in 40 U.S.C. 486(c), has promulgated regulations for the use of the Federal Telecommunications System (FTS). 41 C.F.R. 101-37.311 prohibits, with certain exceptions, the one-party consensual interception of conversations on the FTS or any other telephone system approved in accordance with the Federal Property and Administrative Services Act of 1949.

PROPOSED LEGISLATION

S. 2669 would amend Title III by adding a new section 2511A making it a crime, punishable by imprisonment for up to six months and a fine of up to \$1,000, for any official, employee, or agent of the United States, while acting in his official capa-

city, to intercept a wire or oral communication to which he is a party, notwithstanding the provisions of 2511(2)(c) or (d).¹

DISCUSSION

We oppose the enactment of this bill because making a federal crime of this conduct would cause unnecessary burdens for law enforcement personnel. Passage of the bill would be an overreaction to the highly publicized conduct of one federal official -- which we in no way condone -- but which had nothing to do with law enforcement.

The Supreme Court has held that intercepting or recording one's own conversations is not an invasion of privacy that violates the Fourth Amendment.² What is involved is a breach of trust that the specific words, tone, and inflection of the conversation are limited to the parties to it, and this breach of trust arguably does not even occur until a recording of the interception is played for or furnished to a person not a party to the conversation. Therefore, Title III struck the correct balance in terms of penal sanctions by prohibiting only the intercepting of one's own conversations for a harmful purpose.

As a practical matter, we cannot conceive of a case in which a person who intercepted his own conversation should be prosecuted as a criminal unless the interception was made to commit a tort or a crime, e.g., to blackmail the other party, the very type of one-party consensual interception prohibited by Title III. The intercepting of one's own conversations when done for some other purpose is simply not so serious a matter as to justify the diversion of the Justice Department's scarce investigative and prosecutive resources from other offenses.

¹ The bill provides, in lines 1 and 2 on page 2 that such a recording is an offense "notwithstanding the provisions of paragraphs (c) and (d) of section 2511." It is likely that the sponsors of S. 2669 intended that this phrase should read "notwithstanding the provisions of paragraphs (c) and (d) of subsection 2511(2)."

² See, e.g. United States v. White, 401 U.S. 745, 749-750 (1971); Lopez v. United States, 373 U.S. 427 (1963).

In short, we believe that any harm done by a one-party consensual interception (other than for a criminal or injurious purpose) is not a matter warranting the application of penal sanctions and, in the case of an employee of the Executive Branch of the Federal Government, is already adequately subject to the application of appropriate administrative sanctions.

Our second principal objection is that the bill unfairly singles out federal employees and criminalizes only for them the conduct of intercepting their own conversations, while ignoring the identical conduct by all other persons. We assume the bill would apply to officials, employees, and agents of the Judicial and Legislative Branches of the government as well as of the Executive Branch. S. 2669 makes it a crime for an employee in the Department of Agriculture, a Senate staff aide, or a Supreme Court Justice to intercept his or her own conversation, but would not apply to the identical conduct by, for example, a businessman, state official, or an attorney in private practice. Title III, which this bill would amend, is not limited to the federal establishment. Title III, in the interest of protecting privacy, applies throughout the private sector and to officials and employees of State and local governments, as well as to those employed by the federal government. If the proponents of S. 2669 genuinely believe, contrary to our own views, that the conduct to be prohibited by this bill constitutes such a serious breach of privacy, justifying the creation of a federal criminal remedy, then logically the bill should apply equally to all individuals and not only to those persons working for the United States and its departments and agencies.³

³ In fact, because of the bill's limitation to persons "while acting in [their] official capacity," its prohibitions would not even apply to a federal official who secretly recorded a telephone conversation on his office telephone concerning a matter unrelated to his work, such as a personal business matter.

Criminalizing this conduct presents another problem. We all know that government must do some monitoring and intercepting of oral communications. We all know that we cannot possibly foresee all the exceptions that must be made so that truly innocent people do not go to prison for merely doing their jobs. The bill attempts, but fails, to cure this problem by saying the Attorney General can write regulations for these exemptions. The failure comes because this procedure only brings more problems than it cures. Let me explain. We realize that this provision was included to allow monitoring or recording in situations where they are reasonable and necessary for the government to carry out its function. Clearly, the Attorney General is the appropriate official to issue regulations for the executive branch pertaining to such interceptions made for purposes such as law enforcement, national security, and intelligence. But what about the separation of powers of the three branches. Should the Attorney General issue or approve regulations that apply to the legislative or judicial branches? Even within the executive branch there are situations other than those relating to law enforcement, security, and intelligence in which one-party consensual recordings might also be reasonable and which are hard to foresee by the Attorney General. For example, a regulation allowing a recording by a handicapped or temporarily injured person would seem reasonable in many instances.⁴ On the other hand, we are aware that many handi-capped persons specifically reject the idea that they should be treated differently with respect to the way they do their jobs and would oppose such a regulation. This is the type of decision made much more appropriately by the head of

⁴ See, for example, 41 C.F.R. 101-37.311-3(d), which permits recordings by handicapped persons provided a physician has certified that the use of a recording device is required for the performance of the person's duties and the head of his or her agency has concurred with the physician's certification.

each agency than by the Attorney General for the government as a whole.⁵

In addition to these matters of overriding concern, we also point out that S. 2669 suffers from a number of drafting flaws. For example, the bill punishes whoever "violates" its provisions but fails to include any scienter requirement such as "knowingly" or "intentionally." Thus, it would apparently cover inadvertent violations, such as an official who forgot to obtain the consent of one of several parties to a multi-party conference call to make a recording. A second drafting problem is that the bill does not address the question of who bears the burden of proof regarding fitting into the exceptions. Proposed subsection 2511A(b) provides that the section's prohibitions against the one-party consensual interception of conversations shall not apply in four listed circumstances. However, the bill is silent as to whether the defendant would bear the burden of proving that his intercepting the communication was covered by one of these exceptions or whether the government would bear the burden of proving that his conduct was outside of any of them. A defendant normally has the burden of proof of an affirmative defense. But proposed subsection 2511A(b)(3) provides that the section does not apply to a person making the interception if he was acting pursuant to a regulation approved by the Attorney General or unpublished guidelines approved by the Attorney General if the Attorney General determines there is a compelling governmental interest in not making the guidelines public, and proposed subsection 2511A(b)(4) provides that the section does not apply to a person intercepting a communication constituting a criminal

⁵ Another example might be an exemption, applicable to certain agencies for recording conversations in a foreign language with which the called person was not familiar, or an exemption in particular areas such as federal enclaves, for the recording of emergency messages so as to permit an accurate response by medical or firefighting personnel.

or tortious act or threatening to perform such an act. Requiring a defendant to prove that his conduct was within one of these exceptions would be extremely burdensome and unfair. For example, it would be very difficult for a defendant to show that the Attorney General had followed all administrative requirements in approving a regulation or in deciding that an unpublished guideline would suffice. Also, requiring the defendant to prove that the communication constituted a tort, a crime, or a threat thereof would necessitate, in effect, a trial within a trial on this question.

Another problem is that the exception allowing a one-party consensual interception of a communication "constituting" a tort or a crime is too narrowly drawn. At a minimum, it should apply in cases where the person making the recording shows that he acted in a reasonable, good faith belief that the communication he recorded constituted such an act or a threat to commit such an act.

Mr. Chairman, that concludes my prepared testimony and I would be happy to answer any questions the Subcommittee may have.

Senator LAXALT. I do not think I have any questions. I think you have made your position very well. The fact is—and I suppose the Wick case is a clear example—that there are sanctions when this type of activity is uncovered, as was the case with him. He certainly has paid dearly for what was an indiscretion on his part, and which he admitted.

It seems to me—and I have watched these new people come into the Federal Government, Senator Metzenbaum—part of the problem is the fact that you get all these people from the private sector, and there is a different set of rules out there very often. I personally have never indulged in taping anybody even when I was a vigorous trial lawyer; I just did not figure it was right. But I know that that view is not subscribed to either in the professions or in the business community. We bring them here to Washington, and very often, I think they are unaware of what the rules are here.

Now, in Mr. Wick's case, apparently, he was admonished by counsel, and that is an exception, but I rather think that in a lot of these areas of conduct, they come here, where we have a wholly different standard—properly so—and these people very often are unaware of it. All of which leads me to the conclusion that probably the essential element in any transition is to have comprehensive briefings about what the ground rules are here in Washington, DC, lest they get into the kind of difficulty that Charles Wick did.

I think you made an excellent statement.

Do you have any additional questions, Senator Metzenbaum?

Senator METZENBAUM. Just one, Ms. Toensing.

What concerns me is—it is true that Mr. Wick has suffered the embarrassment of publicity. The facts are, or I guess the facts are—I am not sure what the facts are—but according to the other committees that have explored this subject, it would appear that other agencies have done taping without consent, and those individuals have not suffered any penalties or sanctions or any embarrassment.

Senator LAXALT. Is there any evidence, if the Senator would yield, of this kind of conduct since the Wick disclosures? Because I rather imagine the whole Wick episode had a rather chilling effect upon this kind of conduct anywhere in the Federal Government.

Senator METZENBAUM. I know of no evidence since then but it sometimes takes a while until you learn the facts.

One of the things that bothers me particularly about the Wick matter is that Mr. Wick specifically said that he was advised, and in his own words, he said that GSA regulations carried no sanctions, and on that basis, I frankly did not regard them as legal constraints.

Now, that mitigates strongly against your assertion that you do not have to make it criminal, because here is a man who says, "I know those were the rules, but I also concluded that there was nothing they could do to me." He did not know that Mr. Safire was going to make this a public matter and therefore a matter discussed at some length across the country.

But does that not concern you and the Justice Department, that without there being some legal constraint, that others in the Government may feel free to tape without consent?

Senator LAXALT. Will the Senator yield on that point?

Senator METZENBAUM. Surely.

Senator LAXALT. It seems to me that if you contend that something should be done because there are no sanctions, why go all the way over and require that sanction to be a criminal penalty, moving unnecessarily, I think, to the extreme. There are obviously other sanctions that could be imposed, going all the way, I suppose, to suspensions, terminations, or whatever. And it seems to me that that can be built in. If you are talking about sanctions, there is no reason we have to move all the way over and make criminals out of these people for activities that the witness, I think, properly indicates are not all that serious and would be burdensome in the criminal enforcement process.

Ms. TOENSING. I believe Mr. Carr from GSA will discuss that more, but the thrust is that it becomes a personnel matter. You work with individuals who are doing that misconduct, and you either sensitize them or something else.

Senator METZENBAUM. I have no further questions. Thank you.

Senator LAXALT. We thank you very kindly. You may be excused, if you choose.

Ms. TOENSING. I do not choose, but someone else wants me, Mr. Chairman.

Senator LAXALT. We understand.

Ms. Lawton, you are next on the list. We would be pleased to hear from you. You are speaking here as counsel for the intelli-

gence agencies, and you are from the Department of Justice, the Office of Intelligence Policy and Review.

STATEMENT OF MARY C. LAWTON

Ms. LAWTON. Thank you, Mr. Chairman.

By and large, the position of the Department has been stated by Ms. Toensing, but because the intelligence agencies have particular concerns in this area, I was asked by them to represent their views collectively, and I have a prepared statement, which I think I can summarize briefly.

Senator LAXALT. Do you have a full prepared statement, as well?

Ms. LAWTON. Yes, I do, Senator.

Senator LAXALT. We will file that. The Senator has no objection. You may summarize, if you would like.

Ms. LAWTON. There are several deleterious effects, we believe, that S. 2669 would have on intelligence agency functions notwithstanding that we recognize an effort to deal with those.

The first is that it is unclear whether the exemption provided in section (b)(2)(a) for the interception of communications for security purposes would cover all the communications security programs conducted by the National Security Agency and the Department of Defense. "Security" is not a defined term here, and it is understood by different people in different ways.

We explained in a letter to the House of Representatives, commenting on similar legislation, that communications security monitoring involves the listening to and/or recording of communications transmitted over government telecommunications systems to determine whether the users are advertently or inadvertently disclosing classified information. Employees of agencies that conduct communication security monitoring are notified that monitoring may be taking place, either by a notice actually on the telephone instrument or by notices posted on bulletin boards and in agency directories. There are extensive regulations for agencies conducting communications security monitoring, but no notice is provided to the person on the other end of the telephone. And in this sense, it is not clear to us the impact that this bill would have on the communications security monitoring.

The Department of Defense has a further problem with S. 2669 for a related reason. It could impair the monitoring of the recording—

Senator LAXALT. Ms. Lawton, excuse me. You said the Department of Defense?

Ms. LAWTON. Defense, yes, Senator.

Senator LAXALT. All right.

Ms. LAWTON. It has monitoring and recording of command and intelligence center communications. These are similar in operation to communications security monitoring, but the purpose of command and intelligence center communications is to determine the accuracy of orders given to and from such centers over official systems, the appropriateness of the response of personnel who receive orders from the centers, and the term is a defined term, which covers not just communications security as we understand it normally, but activities that involve the disposition of armed forces,

the implementation of the Defense Department's foreign intelligence mission, emergency police and fire reporting, air traffic control, distress calls from ships and aircraft, and the coordination of actions resulting from bomb threats and hijacking incidents.

Again, as we read the language, S. 2669 could unnecessarily impede the operations of these programs.

The CIA has also raised additional concerns peculiar to its mandate. The bill provides that foreign intelligence and counterintelligence officers acting in the normal course of their employment may engage in monitoring, but it does not take into account the fact that the CIA has some operations personnel who, while not a normal function, nevertheless on occasion must engage in security monitoring. Would these people be protected, or would they be criminalized by the language of the statute? It is not clear to us.

Finally, it has been suggested by some agencies, although none has implemented it yet, to my knowledge, that operators on agency switchboards ought to be able to record all incoming calls after hours, at least, in order to have an accurate record if a threatening call is made. Currently, these agencies can switch over to a security officer any call that is identified as threatening, and this, I take it, is what the security language in the bill is intended to take care of.

Senator METZENBAUM. Mr. Chairman, I do not wish to interrupt Ms. Lawton, but I know you have a long list of witnesses. And I just want to say to Ms. Lawton that nothing that you have said so far is of concern to the author of the legislation, and I would guess it is not of concern to Senator Bumpers, the coauthor.

We are prepared to accept an amendment as you draft it to exempt the activities about which you are speaking, because that is not the thrust of this legislation. So you need not make out a case for what you are saying, because we are on your side; we have no problem with what you are talking about doing. We have problems about agencies other than the NSA and DOD and other intelligence agencies of Government. Those are not the thrust of this bill. So I would just say that you do not have to convince me. You just prepare the language, and we will include it.

Senator LAXALT. That is an offer you can scarcely refuse, Ms. Lawton.

Ms. LAWTON. There are so many other areas, though, Senator. I was not as aware as Ms. Toensing was that this bill was intended to cover all three branches of Government, and just thinking, since the Senator said that, of other possibilities, the Federal Rules of Criminal Procedure require magistrates on telephone warrant applications to record the conversation so there is an accurate record of the probable cause. But that is not something that was thought of here, because we did not have provision; we were not aware that this was covered.

What I say today is being recorded. There is no provision in the bill.

Senator METZENBAUM. That would not be a violation of this under any circumstances. This is not a telephone conversation. There is nothing in the bill that says you cannot ever record anybody's conversations.

Senator LAXALT. It is my understanding here that—

Ms. LAWTON. It is reference to wire or oral communication. Oral communication in the bill is broader than telephone.

Senator LAXALT. Well, unless I am wrong, I do not think there is anything in this present legislation, Senator Metzenbaum, that limits it purely to telephone conversations. I think the witness is right, that this would technically be in violation of this language.

Senator METZENBAUM. If it is—you know, you can find lots of fly-specks, but the question really is to get at the fly itself.

Senator LAXALT. So the record can be clear on it, is the thrust of this legislation and the intent of the cosponsors, you and Senator Bumpers, directed purely to telephone conversations——

Senator METZENBAUM. Correct.

Senator LAXALT [continuing]. And not the kind of situation we have here, where the witness's testimony is being recorded——

Senator METZENBAUM. Absolutely.

Senator LAXALT [continuing]. With or without their consent?

Senator METZENBAUM. Absolutely.

Senator LAXALT. We thank you for raising that point.

Ms. LAWTON. I have no other comments, Senator. I would be happy to answer any other questions.

Senator LAXALT. I do not have anything additional, Ms. Lawton. We thank you very much.

Senator METZENBAUM. No questions. But I would look forward to hearing from you if there are suggestions you have with respect to language.

[The prepared statement of Ms. Lawton follows:]

PREPARED STATEMENT OF MARY C. LAWTON

Mr. Chairman and Members of the Subcommittee, as Counsel for Intelligence Policy at the Department of Justice, I would like to thank you for inviting me to testify on behalf of the Intelligence Community regarding S. 2669.

Let me begin by saying that the testimony I am about to give has been discussed and coordinated with the intelligence agencies. For the reasons stated by Ms. Toensing as well as reasons peculiar to intelligence agency operations, the Department of Justice opposes the enactment of S. 2669 as unnecessary and unreasonable. S. 2669 would impede legitimate, preexisting governmental programs that protect the security of highly sensitive and classified information and operations of government.

The intelligence agencies point to several examples of the deleterious effect that S. 2669 would have on these functions. First, it is unclear whether the exemption provided in section (b)(2)(A) for the interception of communications for security purposes would cover communications security programs conducted by the National Security Agency and the Department of Defense. As the Department of Justice explained in a letter to the House of Representatives commenting on similar legislation, communications security monitoring involves the listening to and/or recording of communications transmitted over government telecommunications systems at the agency involved, to determine whether the users of those systems are advertently or inadvertently disclosing classified information. Employees of agencies that conduct communications security monitoring are notified that monitoring may be taking place either by a notice on the telephone instrument itself, by notices posted on bulletin boards and the agency telephone directory, notice given

during briefings of new employees, or in individual notices to the employees themselves. However, no notification is provided to persons calling in to a monitored system from outside a government agency or contractor.

If S. 2669 is enacted, these programs could be threatened, leaving the government unable to determine the effectiveness of the measures it has taken to protect against the unauthorized disclosure of classified information, as well as being unable to assess the nature and extent of the classified information available to foreign powers that might monitor United States communications systems.

The Department of Defense further objects to S. 2669 for a related reason. This legislation could impair the monitoring and recording of command and intelligence center communications. Similar in operation to communications security monitoring, the purpose of command and intelligence center communications monitoring is to determine the accuracy of orders given to and from such centers over official telecommunications systems, and the appropriateness of the responses of personnel who receive orders from the centers. The term "command and intelligence centers" refers to a broad range of Defense Department activities that include the disposition of armed forces, the implementation of the Defense Department's foreign intelligence mission, emergency police and fire reporting, air traffic control, distress calls from ships and aircraft, and the coordination of actions resulting from bomb threats and hijacking incidents. Again, the passage of S. 2669 could unnecessarily impede the operation of these vital programs.

In joining NSA and the Department of Defense in opposing S. 2669, the CIA raises additional concerns peculiar to its mandate and operations. CIA is concerned that the exemptions

provided in section (b)(2) of the bill will not be sufficient to permit the continuation of ongoing CIA operations. In certain cases, security and operational functions overlap so that operational personnel may on occasion perform security functions. S. 2669 may prohibit these personnel from crossing operational and security lines in the performance of their duties if the phrase in section (b)(2)(A), "acting within the normal course of his or her employment," is narrowly construed.

Furthermore, the terms "security, foreign intelligence, or counterintelligence function . . ." in subsection (b)(2)(B) may not be sufficiently broad to encompass all CIA's functions. Unfortunately these cannot be discussed in detail in open session.

Finally, although to my knowledge no agency currently has such a program, several agencies have considered automatically recording all telephone calls that are received by the agencies' general operators in order to accurately record threatening calls. Most agencies have telephone equipment that permits an operator to transfer a call to a security office once the operator perceives a call to be a threat. However, a threatening caller has often left the line and the details of a call are lost by the time an operator determines that a call is threatening and switches the call to security. If a call is not threatening, which most are not, an operator would simply erase the recording before the next call. S. 2669 would prohibit this type of public safety recording when the call does not clearly constitute a criminal or tortious act.

A further example is the recording of ambulance dispatches which ensures that information concerning the location of a victim is accurately received, and that emergency personnel respond adequately. Recent newspaper accounts illustrate the

gravity and importance of recording these calls, yet S. 2669 would prohibit this type of recording at the federal level.

A final example is the recording of calls concerning waste, fraud and abuse in government, again in order to obtain accurate information. Unless such calls themselves constitute a criminal or tortious act, S. 2669 would prohibit their recording. This creates a substantial risk that accurate information providing leads to potential fraud cases or identities of abusers, conveyed during the call, would be lost.

Thank you, Mr. Chairman and Members of the Subcommittee; that concludes my testimony. I would be happy to respond to any questions you may have.

Senator LAXALT. Mr. McBrien, we would be pleased to hear from you.

STATEMENT OF J. ROBERT MCBRIEN

Mr. MCBRIEN. Thank you, Mr. Chairman, and Senator Metzenbaum.

We appreciate the opportunity to appear before the subcommittee today. I have a very brief statement which, in the interest of time, I will make even briefer by summarizing for you.

Senator LAXALT. We would be pleased to have you do that. For the purpose of the record, you are speaking here for Treasury, and you are the Deputy for Security Affairs and Crisis Management within Treasury; is that correct?

Mr. MCBRIEN. That is correct, Senator.

Treasury represents a very significant proportion of Federal law enforcement agencies which would, of course, be affected by this bill and by other bills that have been introduced in the Senate and in the House. However, our concern does not limit itself to those portions of the Department of the Treasury. Our concern with this legislation and other forms of criminalizing legislation in this area is, if I may use your own analogy, Senator Metzenbaum: Are we building too big a flyswatter for the fly we are after?

In essence, we think that is true. As Ms. Toensing said, we are dealing with something that people may view as obnoxious, and they may find it reprehensible, but is it something that is wrongful enough and has enough impact on society and individuals in terms of victimization that it should be made a crime?

What we are talking about is not eavesdropping on conversations of other parties who are unwitting that their conversations are being overheard. What we are talking about is a breach of confidence by one of the parties to the conversation, inasmuch as either he himself is recording or, within the terms of the bill, merely lis-

tening to the conversation and perhaps making notes—that is not quite clear to me—or, he has another party who is involved in listening in on the conversation with his consent. That is a breach of the trust involved. It is not a violation of an expectation as where the two parties are totally expecting that their conversation is going to be private.

The Supreme Court, in *White v. United States*, held some years ago that you cannot have a greater expectation in the privacy of your conversation with an individual from being recorded by him or electronically monitored by that individual than you can that he will not turn around and, with an excellent memory, publish the substance of your conversations in all the newspapers.

Our view is simply that the Treasury agencies have a lot of Federal criminal statutes which they have to enforce. Our colleagues in the Federal Bureau of Investigation have a great number of Federal statutes which they have to enforce. We do not think that this is an appropriate type of wrong to be added to the Federal criminal statutes, and we would not want to endorse legislation that would do that at this time.

Senator LAXALT. We thank the witness.

Mr. McBrien, let me ask you as a matter of curiosity—these two witnesses, and I assume, Mr. Carr, as well, are all engaged in one manner or another in intelligence activities. Is it ordinarily the rule that in conversations that are sensitive in nature or technical in nature, as between those of you communicating in relation to security and intelligence matters, that they would normally be recorded? Is there any practice in the Government in these areas, just in the interest of making an accurate record? Is there a standard of any kind?

Ms. LAWTON. There is in the Defense Department operations, monitoring, Senator. It would depend otherwise on the circumstances as defined in individual agency regulations. For example, we do not in Justice, at least in my office, monitor just for the sake of accuracy. The FBI, however, in a counterintelligence investigation, may very well have a body recorder on one of the parties.

Senator LAXALT. I understand that, but suppose that Ms. Lawton calls Mr. McBrien, and you are dealing with a sensitive matter or a technical matter. Would it normally be the case that either of you would assume that that kind of conversation would be recorded without saying, "Hey, Mary, I have a recorder on you"?

Ms. LAWTON. A verbatim recording, no; an immediate memorandum of conversation to the files, yes. The difference, of course, is that the recording is more accurate than the memory. But as a practical matter, it is not widespread, in my experience.

Mr. McBRIEN. That is the same, certainly, from the perspective of all of our law enforcement bureaus. We certainly have situations that are other than investigative, where it might be advantageous from some historical perspective to have had a recording of all parts of the conversations going on during the management of some kind of national security or law enforcement crisis. But we have never instituted that in our Department. We could very well find that that would be advisable, but again, that would be something where the parties were aware that conversations are, as a matter of precaution and history, recorded.

Senator METZENBAUM. Mr. McBrien, I am curious as to when Treasury sees fit to record a conversation and when they do not, and what standards have been established in the Department as to when it is permissible and when it is not. A lawyer calls in and is talking with somebody from the IRS on a pending matter. Is that recorded?

Mr. MCBRIEN. Well, Senator, the Treasury Department has an internal regulation on the conduct of nonlaw enforcement or security monitoring. That is what we call administrative monitoring. And it is generally prohibited to tape record conversations of that sort. The exceptions we have are where we have what amounts to actually two-party consent through notice, as in the Internal Revenue Service circumstance. That is, taxpayers have a taxpayer service number where they can call in, present a problem, and receive an answer. The tax package sent to taxpayers gives them the number, along with some other numbers that can be called, and points out that that number is subject to quality control monitoring within the Internal Revenue Service. No recording is made of that conversation. The taxpayer is not identified except insofar as he might want to be identified in order to have information called back to him.

The purpose is so the Internal Revenue Service can control the quality of the advice being given to the taxpayer. With all the employees of the Internal Revenue Service and, of course, the impact it has on all taxpayers, you have to have some means of having quality control on telephone advice.

Senator LAXALT. Who establishes that kind of standard? Is that done within Treasury, generally, or is it within IRS or GSA? Who establishes that standard?

Mr. MCBRIEN. There is an overall Treasury regulation on monitoring, but the Internal Revenue Service itself establishes standards that are involved with monitoring for taxpayer services.

Senator LAXALT. Is that the kind of thing that the Secretary has to sign off on?

Mr. MCBRIEN. There may be some technical requirement today for his signing off on that if it is a regulation, but no, he does not have to approve the substantive decision itself, although every secretary that I have worked for has been well aware of that issue of taxpayer service monitoring being there.

Senator LAXALT. So the practical fact of the matter is—and I do not know whether there is anything wrong with it—in a complex and diverse agency, a Department like Treasury, you may have several standards and regulations among the various agencies, with each agency, such as the IRS conforming to its own requirements. Is that the case?

Mr. MCBRIEN. IRS is the only one that has that kind of requirement right now. We do not—the other forms of advice we—

Senator LAXALT. How about Customs?

Mr. MCBRIEN. We do not have a regulation like that for the Customs Service.

Senator METZENBAUM. What would you do if somebody called in and had not been paying taxes for a number of years, did not disclose their name, and said, "I have had a \$100,000 a year income

for the last 10 years, and I would like to know how I can do right by the Government. I would like to now correct that situation."

Is there a procedure by which that person's conversation might be recorded, and the call might be traced?

Mr. MCBRIEN. Well, recording the call and tracing the call are two, technologically, very different events.

Senator METZENBAUM. I understand that.

Mr. MCBRIEN. One, even if technologically, we might trace it, I do not think there would be the wherewithal to get that done very rapidly in most instances.

Senator METZENBAUM. To get it traced?

Mr. MCBRIEN. To get it traced sufficiently rapidly in most instances to make a difference. But I think aside from that, the question is, "Is he calling the taxpayer service number?" I would have to defer to IRS. I do not know that they have any procedure in place for the taxpayer service representative to, on his own, determine that this is a criminal situation that he has to call in somebody to record it. He does not have the ability himself to record that telephone call.

Senator METZENBAUM. Well, what is this quality control—I am a little bit confused as to what quality control is vis-a-vis the kinds of opinions that are being offered, and whether or not that makes it possible, then, to record the two-way conversation without the consent of the other party; is that what you are saying?

Mr. MCBRIEN. No; all parties are to consent. There is a general notice in the Internal Revenue package given out to all taxpayers, that if you call the taxpayer service number, your call may be subject to a supervisor monitoring your conversation with the taxpayer advisor, in order that the supervisor can ensure that you are getting accurate advice.

Senator METZENBAUM. But that is given out in the package. If you do not have the packet—and I do not think I have ever seen a packet in my lifetime—and if I or some constituent of mine were to call in the IRS and ask them a question, and they gave an answer, that conversation would be recorded, or could be recorded, under your—

Mr. MCBRIEN. Not record, Senator. Listened to.

Senator METZENBAUM. Listened to.

Mr. MCBRIEN. Listened to. Not recorded. It is not recorded, but listened to by a supervisor, seeing if the advice being given is accurate.

Senator LAXALT. And that is very commonly done in the private sector, isn't it?

Mr. MCBRIEN. I frankly do not know, Senator. I presume it is.

Senator LAXALT. I would presume there is correspondence dealing with that point, where the supervisors, or even people checking on supervisors, want to know when customers call in, asking for a given piece of information, whether it is consistent with company policy or not.

Mr. MCBRIEN. Senator Metzenbaum, the regulations in the Internal Revenue Service for the use of the taxpayer monitoring are rather extensive. It is a very carefully controlled situation. I am certain that we could provide you with copies of those regulations, if you would care to have those entered in the record.

Senator METZENBAUM. I think we would like to have for the record what those regulations are, and then we would also be interested in how Treasury thinks that this legislation could be drafted, so that Treasury and IRS could pursue their legitimate concerns without going beyond the border of impropriety.

Mr. McBRIEN. Senator, we would be very glad to join with our colleagues from the Department of Justice on any suggestions that they might find appropriate.

Senator METZENBAUM. Thank you.

[The prepared statement of Mr. McBrien and the IRS material requested by Senator Metzenbaum follow:]

PREPARED STATEMENT OF J. ROBERT MCBRIEN

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before this subcommittee today to present the views of the Department of the Treasury on S.2669, a bill to prohibit Government employees from intercepting conversations with others.

Treasury has joined with its colleagues from the Department of Justice in commenting upon this bill because Treasury is responsible for a significant proportion of those Federal agencies which use, for law enforcement purposes, one-party, consensual monitoring of conversations: The Bureau of Alcohol, Tobacco and Firearms (ATF); the U.S. Customs Service, the Internal Revenue Service (IRS) and the U.S. Secret Service. In addition, the Internal Revenue Service makes significant use of telephone monitoring with the implied consent of at least one party in order to ensure quality control of taxpayer assistance services and collection procedures.

The Treasury Department opposes the enactment of S. 2669 as well as other legislation relating to the consensual monitoring and recording of conversations. Title III of the Organized Crime Control and Safe Streets Act of 1968 already provides adequate criminal sanctions for wholly unconsented, illegal interceptions of communications. In addition, the Supreme Court has recognized that consent by one party to a conversation obviates any reasonable expectation by others that the contents of that conversation are any more privileged than the other party decides to make them.

Very simply: we see no demonstrable record of injury to the public or of either widespread or frequent use of unauthorized one-party consensual monitoring of conversations by federal employees. This bill, like others we have seen introduced in the past few months, appears to be premised on the belief that one public official's mere recording of his own telephone calls is sufficient reason to enact another Federal criminal statute. We do not believe that this isolated incident warrants legislation of this nature.

This bill, if it became law, would add another tool of harassment to the criminal defendants and, in some cases, "professional litigants" who defend their actions by accusing federal officials, particularly Federal law enforcement officers, of committing crimes, violating citizens' rights, or both.

Furthermore, the federal employee who merely takes shorthand or other careful notes during a conversation or who has an excellent memory and later recalls with great accuracy a conversation, could become the subject of charges that he unlawfully intercepted his own conversation with another person.

Indeed, one has to wonder whether accurate notetaking of conversations will be found to require the consent of all parties and whether it is to be deemed preferable to take careless notes which do not accurately reflect the substance of conversations than to precisely transcribe the contents of someone else's side of a conversation. It does not strain our imagination to envision a federal employee, such as a female secretary, who is suffering the indignity of sexual advances by a co-worker or superior against whom she is afraid to make an accusation without strong corroborative evidence. It should not be surprising if, in her defense, she begins to use a dictating machine or tape recorder to record conversations with her tormentor, both on the telephone and in person. Without

belaboring the question of whether or not the other party's conduct constitutes a tort or a crime, we should recognize that the employee would be in danger of violating the statute if on one of the intercepted occasions her superior was simply communicating instructions in the normal course of business and not calling to make an improper advance. She, of course, could not know in advance what course his conversation would follow on that occasion. Similarly, if one of her colleagues were to hide inside a closet in order to overhear the improper advances they anticipated would be made, both of them might be in jeopardy of violating the proposed law.

These are simple illustrations of problems that appear on the face of the bill. I share with my colleagues from Justice the other more technical concerns which they have discussed. For all of these reasons the Department of the Treasury opposes the enactment of S. 2669.

That concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions which you or other members of the subcommittee may have.

Material Requested at the June 13 Senate Subcommittee
Hearing on S. 2669

Attached is the material relating to IRS quality review telephone monitoring which was requested by Senator Metzenbaum during the July 13 testimony of the Treasury Department on S. 2669 before the Senate Judiciary Subcommittee on Criminal Law.

- (1) Policy Statement P-1-44 -- Monitoring of Taxpayer Service, Collection Office Function, and Service Center Collection Function Telephone Conversations.
- (2) Internal Revenue Manual Handbook 6541, Chapter 410 -- Monitoring.
- (3) Internal Revenue Manual Handbook 6542, Chapter 120 -- Ban on Recording Taxpayer Identification During Phone Monitoring.
- (4) Internal Revenue Manual Handbook 6560, Chapter 250 -- Telephone Service Quality Review.
- (5) Internal Revenue Manual 5187 and Exhibit 5100-27 -- Monitoring Telephone Calls.
- (6) Internal Revenue Manual 5(19)12, Chapter 500 -- Telephone Monitoring in ACS (Automated Collection System).
- (7) Form 1040 tax package for 1983, page 45, which contains the notice to the public about monitoring telephone calls. This same notice appears in Publication 910, Taxpayer's Guide to IRS Information, Assistance, and Publications, and in various notices to taxpayers prepared by the Service Centers.

page 1218-30
(5-18-83)

Policies of the Internal Revenue Service

P-1-41 (Approved 7-25-60)

Top Service officials to be alerted to litigation having serious administrative implications

Whenever litigation in any case reaches a point where it is clear that serious administrative problems will result from an adverse decision by the court and it appears that there is substantial doubt that the Government's position will be sustained in further litigation, top Service officials must be advised promptly.

Accordingly, any such case whether lost in the court of original jurisdiction or on appeal will be brought to the personal attention of both the Commissioner and the Chief Counsel.

P-1-42 (Approved 12-28-70)

Service activities to be scheduled to permit travel within regular working hours; exceptions permitted

In compliance with Section 610(b)(2), Title 5, U.S. Code, official Service events and activities away from the employees' assigned places of business, such as work assignments, details, training courses, meetings, management conferences, field visitations, and transfers are to be scheduled, to the maximum extent practicable, so that travel to and from them can be within regular working hours. However, when he/she considers it essential (e.g., the success of the event is dependent upon such travel), the official responsible for controlling or scheduling the event may require travel outside regular working hours provided Office of Personnel Management and other directives are observed.

Voluntary travel

For personal reasons, an employee may voluntarily perform required travel outside his/her regular working hours, provided that per diem and transportation expenses are limited to the amounts that would have been incurred had he/she traveled as originally directed, unless some or all of the additional travel time is approved as advantageous to the Government.

P-1-43 (Approved 4-16-82)

Maximum utilization of service center, Data Center and National Computer Center, space and equipment through multi-shift staffing.

To cope with the widespread space shortage which is expected to result from increased service center workload growth and to ensure maximum utilization of space and equipment, all service centers must move as close as possible to a 1:1 prime shift to second shift ratio for all programs in all organizations. Data Center and the National Computer Center should also make maximum use of space and equipment through multi-shift staffing.

P-1-41

IR Manual

MT 1218-142

P-1-44 (Approved 3-31-78)

Monitoring of Taxpayer Service, Collection Office function and service center Collection function telephone conversations

The use of telephone equipment enabling managers or their designees to monitor telephones used by Collection Office function, service center Collection function and Taxpayer Service employees is permitted to determine employee courtesy and accuracy and for training purposes. No such conversations may be recorded, and the telephones monitored must be conspicuously labeled so that employees may distinguish them from ordinary telephone service and know that telephone calls may be monitored. Monitoring of telephones in the service centers will be limited to those areas in each center where the majority of incoming calls are directed for Taxpayer Service work and the majority of incoming and outgoing calls are made for Collection related interviewer work.

(P-1-45—P-1-62 are reserved)

FINANCIAL MANAGEMENT

P-1-63 (Approved 3-3-60)

Operations to be under Financial Plan

The Internal Revenue Service shall operate under a Financial Plan consisting of a comprehensive and unified plan of action for carrying out the programs of the Service during a specified period, expressed in terms of work to be done and staffing and dollars to be devoted thereto.

P-1-64 (Approved 3-3-60)

Financial management system to include management at all levels

Management at all major operating levels shall participate in financial management in order that realistic financial plans shall be developed and planned accomplishments attained during the execution of financial plans.

P-1-65 (Approved 3-3-60)

Budget estimates as commitments

The Service's budget document shall be a technical expression (in the form prescribed by the Department of the Treasury, Office of Management and Budget, and the Appropriations Committee) of the Financial Plan of the Service for the Budget year. Such document shall be based on the most realistic estimates that can be made of the programs, staffing, workload, etc., for the applicable year and shall take into account that, to the extent that budget is approved, such estimates may be regarded by the Treasury, the Office of Management and Budget, and the Congress as commitments to be fulfilled.

Chapter 400

page 6541-23
(10-18-83)

Telephone Assistance—Direct Taxpayer Inquiries

410 (10-18-83)

6541

Monitoring

(1) Monitored calls are those conversations between taxpayers and assistors which are purposely overheard. These monitored calls are used to make representative quality reviews of the total telephone service (see policy statement P-1-44).

(2) All telephone inquiries made to the toll-free site will be subject to monitoring. Telephones subject to quality review monitoring will be clearly labeled as such.

(3) A Form 5493 entry should be made for each call monitored for quality review.

(4) The number of calls to be monitored depends upon workload for either the district or for each answering site. Reports are statistically valid only for the organizational level for which a full sample is taken. The size of the sample will be determined by using the quality review sample table (Exhibit 3). The volume of work is to be based on the number of calls answered for which accurate historical data is available.

(5) Sample selection

(a) In locations with an ACD (Automatic Call Distributor) system, choose at random the first station to be monitored from among those shown on the lamp cabinet as staffed and taking a call or ready to receive a call. Monitor the call for an entire conversation. Then sequentially search for the next staffed station regardless of whether that station is taking a call or ready to receive a call. Continue this process until the desired sample is attained. Re-sample previously sampled stations if necessary.

(b) In locations not having an ACD, choose at random the first station to be monitored from among those that are staffed.

(c) Whatever the number of calls monitored for the first station, the same number of

calls must be monitored for each subsequent station until the required sample size is reached. In a volatile situation in which employees are frequently plugging into and unplugging from the system, reviewers should limit their monitoring to one or two sampled calls for each station. It is quite possible that not all stations will be monitored using this procedure; however, this random selection process must not be modified. Managerial reviews, not to be input to QMIS, should be conducted, if desired, of those stations not randomly selected during the quality review process.

(6) In all locations where calls are monitored, procedures must be established to correct any error detected during calls under review. A reviewer should be able to signal the assistor, who will place the taxpayer on hold. The quality reviewer or one of the referral personnel should clarify the appropriate response for the assistor, who should then in turn provide the correct answer to the taxpayer. If the assistor is unable to handle the contact because of inadequate technical skills in the area of inquiry, the inquiry should be referred. Prompt referral by an untrained employee is a correct response. Any problem may be discussed later with the assistor as time permits.

(7) For statistical reporting purposes, telephone calls should be monitored according to the guidelines outlined above. During the early part of the filing period, districts may wish to increase managerial reviews, as resources permit, due to the large number of detailed and new employees performing Taxpayer Service duties. Managerial reviews are not part of the formal quality review sample, and, therefore, their results must not be input to the Quality Review System via IDRS.

Introduction

110 (11-30-78)

6542

General Information

(1) The fundamental aim of Taxpayer Service is to aid taxpayers to comply with their Federal tax obligations. To achieve this goal, the assistance furnished by Taxpayer Service personnel must be both technically accurate and readily comprehensible to the taxpayer.

(2) This Handbook provides guidelines for quality reviewers to use in reviewing various Taxpayer Service operations. It recommends procedures that quality reviewers may use in carrying out their responsibilities under the quality review system. IRM 6541, Taxpayer Service Quality Review Handbook contains information for management on using the data gathered by quality reviewers.

(3) The guidelines are divided into chapters covering the various Taxpayer Service operations with information on reviewing each.

(4) These guidelines are being distributed under a separate schedule to ensure that each

quality reviewer and appropriate management official has a copy.

120 (8-30-80)

6542

Ban on Recording Taxpayer Identification During Phone Monitoring

(1) Reviewers will not record taxpayer names, Social Security Numbers (SSN), phone numbers, addresses, or other identifying data during quality review procedures involving monitoring of "live" telephone contacts.

(2) During observable tax account referrals, reviewers may temporarily transcribe sufficient data to enable them to verify the technical accuracy of the referral. The data must be destroyed no later than close of business the day following the original contact or as soon as the accuracy of the referral is verified.

(3) This prohibition is intended to protect the privacy and confidentiality of taxpayer contacts, and prevent the proliferation of taxpayer data within IRS offices.

250 (7-6-79)**Telephone Service Quality Review**

6560

(1) The primary method for evaluating the quality of telephone assistance is the monitoring of calls in which a Taxpayer Service manager or quality reviewer listens to conversations between taxpayers and assistants. Monitored calls should be used to make representative quality control reviews of the telephone assistance in accordance with the latest Quality Review guidelines.

(2) Employees providing telephone assistance must be notified of the possibility that supervisory or quality review personnel will be monitoring calls periodically for program evaluation purposes. All telephones subject to monitoring should be clearly marked with a label stating, "This telephone is subject to monitoring for the purpose of spot checking taxpayer service work." Managers should ensure that these labels are placed on all such telephones so that the telephone user will have knowledge of the monitoring possibilities.

5186.32 (5-11-79)**Other Uses for the DIIP**

(1) The DIIP should be used to update TDI's with any new delinquent modules which appear on the DIIP but which are not printed on the TDI.

(2) Managers should use the DIIP to identify and monitor coverage TDI's; to monitor TDI inventory levels; and to analyze the length of time each TDI has been in inventory. The DIIP can also be used as the source document for any additional reviews which local management deems appropriate.

5186.4 (6-28-79)**Distribution of the DAIP and DIIP**

The DAIP and DIIP will be issued monthly from the service center per Exhibit 5100-26. Each profile will be separated by Districts and mailed to the Centralized Services Branch/Section. Centralized Services will then forward the profiles to the Collection Office function and to the revenue officer group managers, as appropriate.

5187 (9-4-80)**Monitoring Telephone Calls**

(1) Collection management may occasionally want to monitor Collection office telephone interviews to review the courtesy, quality and uniformity of telephone services being provided the public. Whenever monitoring is conducted, ensure that it is accomplished in accordance with the existing provisions of GSA regulations, as well as IRS policy statement P-9-35. Guidelines for accomplishing Collection telephone monitoring are:

(a) The monitoring of telephone calls in the Collection Office function and service center Collection Function will be limited to those areas where the majority of incoming and outgoing calls are made for collection work.

(b) Employees must be notified that telephones used in connection with their functions will be subject to monitoring.

(c) Telephones subject to monitoring will be clearly marked so that the telephone users will have full knowledge of the monitoring possibilities.

(d) No data identifying the caller shall be recorded by the monitoring party. Retention of any personal characteristics of a call beyond such information as time of day, day of week and general nature of the conversation, is unnecessary and not in compliance with the existing regulations and policy.

(e) Numbers of calls to be monitored should normally be limited to only that amount needed to achieve a statistically valid sample. Recommended maximum sample size for weekly call volumes are shown in Exhibit 5100-27. Reasonable estimates of weekly call volumes are acceptable to use in arriving at the appropriate sample size for a review. In addition, where it is decided to conduct an overall

review of telephone services, the smaller weekly volume operations may be excluded without detracting from the representativeness of a sample.

(2) No one set sampling technique is recommended for all situations. Decisions as to which calls to select and when to sample will depend on varying local factors (i.e. telephone equipment monitoring capabilities, purpose of the review, monitoring resources, etc.). The method chosen should be one that does not allow a monitor to arbitrarily select the calls to be reviewed, or, requires the manager to schedule the telephone operations purposely to coincide with a review of telephone operations or conform to a sampling technique. Choose a selection method which provides the best available cross-section sample of the telephone activity being reviewed.

5188 (4-14-78)**Employee Security in High Assault Risk Areas****5188.1 (6-8-79)****General**

(1) The problem of security of Collection activity personnel in high crime areas lends itself to no easy solution. While we cannot and should not remove our personnel entirely from these areas, we can take steps to minimize the risk of encountering hazardous situations. See IRM 525(13) for special handling instructions.

(2) If a particular geographical area appears to present unusually hazardous conditions for field Collection personnel, the Chief, Collection function (District Director if no Chief) in coordination with the Chief, Examination Division, will recommend to the District Director that such area be designated as a High Assault Risk Area (HARA). The District Director will make the final determination whether the area should be so designated. The decision will be based upon criteria established by the District Director.

(3) Existing HARA designations should be reviewed periodically to ensure that those areas still meet the district's established criteria.

5188.2 (6-8-79)**Procedures**

(1) The following steps, while not all-inclusive, can serve as a guide to help assure the safety of Collection activity personnel making field contacts in high crime areas. These measures, which are optional at the discretion of district management are:

(a) utilization of two-person teams when making field contacts in high crime areas;

(b) variations in conventional dress to permit employees to make field contacts in a less conspicuous manner;

(c) standardization of hours and days during which field contacts are to be made (sched-

Exhibit 5100-27**Telephone Call Review Sampling Table**

◇

Estimated Weekly Call Volume	Recommended Maximum Sample Size
1-7	All
8-12	8
13-19	13
20-30	18
31-44	24
45-63	30
64-87	36
88-125	42
126-180	48
181-300	55
301-520	60
521-1000	66
1001-2000	69
2001-5000	71
5001-over	72

The number of calls to be reviewed should be distributed on a random basis (not necessarily daily) to obtain a representative sample for as many weeks as needed to accomplish the purpose of the review.

Telephone Monitoring in ACS

510 (5-9-83)

5(19)12

General

(1) Intensive management monitoring of ACS telephone contacts will be a continuing requirement. Telephone monitoring is viewed as the single best means for management to gauge the quality and effectiveness of employee actions; correct procedural errors, and provide counseling to employees; identify training needs; and refine the heart of the ACS collection effort—the telephone interview.

(2) All monitoring must be accomplished by managers; it cannot be delegated to non-management employees.

(3) Minimum monitoring requirements vary by function, and are covered in detail in succeeding sections of this Chapter. Management should increase these minimum requirements as needed; for example, to more closely monitor new trainees.

(4) Monitoring and feedback forms have been developed to aid the manager in this task:

(a) Form 8094-A, ACS Monitoring Worksheet, is used to document each monitored call, as well as provide a short summary by the evaluator. No specific case data can be recorded on this Form (e.g. taxpayer name and/or TIN), to comply with GSA monitoring regulations. Entries are expected to be brief, but cover the salient points in the monitored conversations.

(b) Form 8094, ACS Performance Record, is used to summarize the employee's monitored performance over a period of time (minimum quarterly). The Forms 8094-A call worksheets will be attached to, and substantiate, the ratings given.

(5) Managers are cautioned that monitoring recordation will usually meet the criteria for evaluative material, and that the provisions of the NORD Agreement, Article 9, Section 1E must be followed.

(6) Managers should not interrupt monitored conversations, unless a critical error is being made by an employee (e.g., something that would lead to a sensitive or embarrassing situation, or hinder future collection efforts).

(7) Managers should provide employees with immediate feedback on their monitoring results, and not wait until a Form 8094 is prepared to indicate either good or poor performance.

520 (5-9-83)

5(19)12

Contact Function Monitoring

(1) Management will sample six (6) calls per week for each employee regularly engaged in out-call activities (e.g. if a unit consists of 9 employees, then 54 calls should be sampled).

(2) A Form 8094, ACS Performance Record, will be completed at least quarterly, summarizing that period's monitoring results for each employee monitored.

(3) If an employee has been monitored weekly for a full quarter, and consistently performs at or above acceptable levels, management may elect to reduce the monitoring requirements for that particular employee.

(a) Employees selected for reduced monitoring will be monitored a minimum of two (2) times each week, and will have quarterly evaluations (Forms 8094) prepared on them.

(b) When an employee is eligible for reduced monitoring, the manager should discontinue any sampled call once the weekly minimum has been attained.

(c) If an employee receiving minimum monitoring fails to maintain an acceptable standard for any aspect of telephone contact performance, management will revert to the full monitoring level until performance is completely satisfactory.

530 (5-9-83)

5(19)12

Investigation Function Monitoring

(1) Management will monitor three (3) calls each month per employee regularly engaged in telephone conversations with third parties.

(2) Form 8094, ACS Performance Record, will be completed at least quarterly, summarizing that period's monitoring performance.

540 (5-9-83)

5(19)12

Research Function Monitoring

(1) A manager will monitor six (6) calls each week per employee regularly assigned to the Incoming Call operation.

(a) A Form 8094, ACS Performance Record, will be completed at least quarterly, summarizing that period's monitoring performance.

(b) If an employee has been monitored weekly for a full quarter, and consistently performs at or above acceptable levels, management

ment may elect to reduce the monitoring requirements for that particular employee.

1 Employees selected for reduced monitoring will be monitored a minimum of two (2) times each week, and will have quarterly evaluations (Form 8094) prepared on them.

2 When an employee is eligible for reduced monitoring, the manager should discontinue any sampled call once the weekly minimum has been attained.

3 If an employee receiving minimum monitoring fails to maintain an acceptable standard for any aspect of telephone contact per-

formance, management will revert to the full monitoring level until performance is completely satisfactory.

(2) For Research employees not regularly performing in-call duties:

(a) Management will monitor three (3) calls each month per employee regularly engaged in telephone conversations with third parties, or occasionally answering incoming calls.

(b) Form 8094, ACS Performance Record, will be completed at least quarterly, summarizing that period's monitoring performance.

To Call IRS Toll-Free for Answers to Your Federal Tax Questions, Use Only the Number Listed Below for Your Area

Caution: "Toll-free" is a telephone call for which you pay only local charges with no long-distance charge. Please use a local city number only if it is not a long-distance call for you. Otherwise, use the general toll-free number given.

We are happy to answer questions to help you prepare your return. But you should know that you are responsible for the accuracy of your return. If we do make an error, you are still responsible for the payment of the correct tax.

To make sure that IRS employees give courteous responses and correct information to taxpayers, a second IRS employee sometimes listens in on telephone calls. No record is kept of any taxpayer's name, address, or social security number.

If you find it necessary to write instead of calling, please address your letter to your IRS District Director for a prompt reply. Make sure you include your social security number or taxpayer identifying number when you write.

The IRS has a telephone service called Tele-Tax. It provides recorded tax information tapes on about 140 topics covering such areas as filing requirements, dependents, itemized deductions, and tax credits. Tele-Tax is available 24 hours a day, 7 days a week, to taxpayers using push-button telephones, and Monday through Friday, during office hours, to taxpayers using rotary (dial) phones. See Tele-Tax Information in the index for the page numbers that contain telephone numbers, available topics, and instructions describing how to use this service.

Alabama

Birmingham, 252-1155
Huntsville, 539-2751
Montgomery, 264-8441

Alaska

Anchorage, 276-1040
Elsewhere in Alaska, call operator and ask for Zenith 3700

Arizona

Phoenix, 257-1233
Tucson, 882-4181

Arkansas

Little Rock, 376-4401

California

Please call the telephone number shown in the white pages of your local telephone directory under U.S. government, Internal Revenue Service, Federal Tax Assistance.

Colorado

Denver, 825-7041

Connecticut

Call 1-800-424-1040

Delaware

Wilmington, 573-6400

District of Columbia

Call 488-3100

Florida

Fort Lauderdale, 522-0704
Jacksonville, 354-1760
Miami, 358-5072
Orlando, 422-2550
St. Petersburg, 823-7459
Tampa, 223-9741
West Palm Beach, 655-7250

Georgia

Atlanta, 522-0050
Augusta, 724-9946
Columbus, 327-7491
Macon, 746-4993
Savannah, 355-1045

Hawaii

Oahu, 546-8660
All other islands, 1-800-232-2511

Idaho

Call 1-800-424-1040

Illinois

Chicago, 435-1040

Indiana

Indianapolis, 269-5477

Iowa

Des Moines, 284-4850

Kansas

Call 1-800-424-1040

Kentucky

Louisville, 584-1361

Louisiana

New Orleans, 581-2440

Maine

Call 1-800-424-1040

Maryland

Baltimore, 962-2590
Prince George's County, 488-3100
Montgomery County, 488-3100

Massachusetts

Boston, 523-1040

Michigan

Ann Arbor, 769-9850
Detroit, 237-0800
Flint, 767-8830
Grand Rapids, 774-8300
Mount Clemens, 469-4200
Pontiac, 858-2530

Minnesota

Minneapolis, 291-1422
St. Paul, 291-1422

Mississippi

Biloxi, 868-2122
Gulfport, 868-2122
Jackson, 948-4500

Missouri

St. Louis, 342-1040

Montana

Call 1-800-424-1040

Nebraska

Omaha, 422-1500

Nevada

Las Vegas, 385-6291
Reno, 784-5521

New Hampshire

Call 1-800-424-1040

New Jersey

Camden, 966-7333
Hackensack, 646-1919
Jersey City, 622-0600
Newark, 622-0600
Paterson, 279-9400
Trenton, 394-7113

New Mexico

Call 1-800-424-1040

New York

Brooklyn District
Brooklyn, 596-3770
Nassau, 294-3600
Queens, 596-3770
Suffolk, 724-5000
Buffalo District (Central and Western New York)
Buffalo, 855-3955
Manhattan District
Bronx, 732-0100
Manhattan, 732-0100
Rockland County, 997-1510
Staten Island, 732-0100
Westchester County, 997-1510

North Carolina

Charlotte, 372-7750
Greensboro, 274-3711
Raleigh, 828-6278

North Dakota

Call 1-800-424-1040

Ohio

Cleveland District
Akron, 253-1141
Canton, 455-6781
Cleveland, 522-3000
Toledo, 255-3730
Youngstown, 746-1811
Cincinnati District
Cincinnati, 621-6281
Columbus, 228-0520
Dayton, 228-0557

Oklahoma

Oklahoma City, 272-9531
Tulsa, 583-5121

Oregon

Portland, 221-3960

Pennsylvania

Allentown, 437-6966
Bethlehem, 437-6966
Erie, 453-5671
Harrisburg, 783-8700
Philadelphia, 574-9900
Pittsburgh, 281-0112

Puerto Rico

San Juan Metro Area, 753-4040
Isla DDD, 753-4549

Rhode Island

Providence, 274-1040

South Carolina

Charleston, 722-1601
Columbia, 799-1040
Greenville, 242-5434

South Dakota

Call 1-800-424-1040

Tennessee

Chattanooga, 756-3010
Knoxville, 637-0190
Memphis, 522-1250
Nashville, 259-4601

Texas

Austin, 472-1974
Corpus Christi, 888-9431
Dallas, 742-2440
El Paso, 532-6116
Ft. Worth, 335-1370
Houston, 965-0440
San Antonio, 229-1700

Utah

Salt Lake City, 524-4060

Vermont

Burlington, 658-1870

Virginia

Bailey's Crossroads (Northern Virginia), 557-9230
Chesapeake, 461-3770
Norfolk, 461-3770
Portsmouth, 461-3770
Richmond, 649-2361
Virginia Beach, 461-3770

Washington

Seattle, 442-1040

West Virginia

Charleston, 345-2210
Huntington, 523-0213
Parkersburg, 485-1601
Wheeling, 233-4210

Wisconsin

Milwaukee, 271-3780

Wyoming

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Indiana residents, 1-
800-382-4059

Elsewhere in U.S.,
including Alaska,
Hawaii, Virgin Islands,
and Puerto Rico, 1-
800-428-4732

Note: If there is no
number listed for your
specific area, please call
1-800-424-1040.

Senator LAXALT. Mr. Carr? Mr. Carr is the Assistant Administrator of the Office of Information Resources Management at GSA. We would be pleased to hear from you.

STATEMENT OF FRANK CARR

Mr. CARR. Thank you, Mr. Chairman.

I have a brief statement I would like to submit for the record.

Senator LAXALT. Without objection, it will be so filed.

Mr. CARR. I would like to make a few points that I think will help shed some light on the GSA regulations and the point of view that went into their construction, if you will. I think it would help some of our discussions.

Senator LAXALT. May I ask a threshold question?

Mr. CARR. Yes, sir.

Senator LAXALT. Is your power and authority to issue these regulations derived from the Omnibus 1968 Act?

Mr. CARR. No, it is not, sir.

Senator LAXALT. It is prior to that?

Mr. CARR. Yes, sir.

Senator LAXALT. It deals with general legislation?

Mr. CARR. The basic authorities we have are in the overall authorities that GSA has to acquire and manage personal property, and within those authorities, all telecommunications equipment and services are included.

Senator LAXALT. Do you mean by having jurisdiction over a telephone, you have jurisdiction also, implicitly or otherwise, as to how that telephone is to be used, or how recorders are to be used? Is that the point?

Mr. CARR. No. The point is that what we are actually doing is implementing the administration's policies—that is, we reflect in our regulations either administration policies or other statutes that have some bearing on acquisition and management of property.

Senator LAXALT. Does that vary, then, depending on the administration?

Mr. CARR. Well, it has not, under the two administrations that I have served under. As a matter of fact—

Senator LAXALT. I see. I thought that perhaps for the purpose of the record, we should ask you that question.

Mr. CARR. As a matter of fact, that is a very good beginning point. The current regulations were drafted under President Carter's administration. There were a number of issues that gave rise to the attention to this problem. We spent about a year and a half, as a matter of fact, looking at various alternative ways of dealing with the issue of listening in, taping of telephone conversations.

The regulations as we put them together, in effect, do three things. First of all, it states that there is a general prohibition on listening in and taping of telephone conversations.

Senator LAXALT. Does this apply to all agencies?

Mr. CARR. It applies to all executive agencies, yes, sir. It does not apply to the legislative branch or the judicial branch.

Senator LAXALT. So that you have through GSA a general prohibition of the kind of conduct to which this legislation is directed?

Mr. CARR. That is correct, Senator.

Senator LAXALT. With any agency—go ahead. You will probably carve out the exceptions as they arise.

Mr. CARR. Yes, that is correct. The exceptions really fall into two major categories. The first set of exceptions deal with criminal investigations and security issues, and what our regulations can do; we have indicated to the agencies that what they are to do is to follow the executive orders or the guidelines or regulations that the Attorney General may put out under the omnibus crime bill. The other set of exceptions deal with those things that impact Government operations, because that is the primary thrust of the responsibilities of the General Services Administration.

Senator LAXALT. What does that mean?

Mr. CARR. Well, we are concerned about how agencies use telecommunications to run their operations more efficiently and effectively, and in the course of examining what the prohibition of listening in and recording of telephone conversations might do to operations, there were a number of exceptions that were brought to our attention—

Senator LAXALT. Do you mean in terms of morale?

Mr. CARR. No, sir. Let me tell you what the exceptions are, and as a matter of fact, at least two of them have been touched upon.

One has to do with public safety. That is the instance, for example, where a security officer receives a call that there is a fire on the third floor of a building. Generally, a call of that sort might be received or given in great panic, and the phone is very quickly hung up. The security officer then can run back that tape to attempt to better interpret what he was told. It is that type of exception, for public safety purposes.

Senator LAXALT. Do all the security officers in government, then, who have a telephone, also have taping equipment?

Mr. CARR. Not necessarily all of them, but a great many of them do, yes.

Senator LAXALT. And, as a matter of general practice, all of those conversations are recorded?

Mr. CARR. That is a very broad practice, yes.

The second type is where a taping is used to permit handicapped employees to be able to carry out their jobs, where they carry on telephone conversations, where they record the conversations, and can afterwards transcribe them as part of whatever their duties are.

Senator LAXALT. Are you talking about sightless people?

Mr. CARR. Yes, generally sightless people, right.

The third is service monitoring. This was touched upon earlier, the type that the Treasury Department or IRS engages in, where the supervisor of a number of employees who deals with the public will listen in on the conversations in order to determine whether or not the call is being handled in an effective, efficient manner, whether the correct information is being given.

Senator LAXALT. Whether the line is being followed?

Mr. CARR. It is not necessarily just the line as whether or not the person calling is being given accurate information regarding how a particular tax problem, for example, should be handled. During the course of preparing our regulations, the House Ways and Means

Committee, for example, gave us an extensive argument as to why it was necessary to have this as an exception to the general prohibition.

So these were the exceptions that we included in the regulations.

Senator LAXALT. Now, this has nothing to do with security or criminal interest; this is just a matter of general policy, to make sure that the advice being given to people who were calling in is consistent with the policy of that particular agency; is that correct?

Mr. CARR. With that particular agency, that is correct, sir.

Now, the——

Senator LAXALT. Doesn't that really give you a blank check, almost?

Mr. CARR. Not really, because again, in the regulations, we point out what the exceptions are, and why the exceptions are there, but then our requirement is that if an agency is going to engage in these practices, then it must put together its own set of procedures and regulations spelling out how the approvals will be given to carry out the practice, and those procedures have to be approved by the agency head or his designee.

In other words, if the agency, in fact, is going to engage in something of this sort, it has to be decided at several levels above the level at which the practice is actually carried out.

Now, I want to point out that our regulations, if we were in the private sector, would be considered operating procedures. They spell out the manner in which the organization should carry out its business. When you get down to the issue of deviations from the regulations, you get into a separate issue, which is how do you handle that particular problem. Again, we treat this as a management problem. If we see that we have a regulation and the agency is not observing it, then we bring that to the attention of the management of the agency at whatever level it is occurring. If necessary, we raise the problem to the next higher level.

Senator METZENBAUM. What if the management of the agency is the one who is creating the problem, as with the USIA? How do you handle that?

Mr. CARR. Having spent several hours answering that question from numerous reports regarding Mr. Wick, I anticipated your question. Insofar as that situation is concerned, it really is handled no differently than an employee at some other level. It is the supervisor of that employee who makes that decision. It is a personnel management problem, as was mentioned earlier. Generally speaking, when you have that kind of situation where an individual, as opposed to the organization, is willfully failing to follow the regulations, then the supervisor has a personnel management problem. Every agency has its own set of personnel management procedures to be followed, has a set of guidelines and recommendations for penalties for first offense, for follow-on offenses. They can range from reprimand, suspension, to dismissal. But it is ultimately the supervisor of that employee who makes that decision.

Senator METZENBAUM. What did you do in the Wick case?

Mr. CARR. What did I do in the Wick case?

Senator METZENBAUM. Did you go to his supervisor, who I think is the President of the United States?

Mr. CARR. I went through the same procedures as I would have in any other case.

Senator LAXALT. Were you aware of the Wick problem?

Mr. CARR. Not until I read about it in the newspapers.

Senator LAXALT. And what, then, if anything, was done?

Mr. CARR. We then carried out an investigation of the USIA to determine, in fact, what had happened, whether or not there were procedures in effect, what the violations were, and then we took one extra step, which is that we have placed additional restrictions or requirements on the USIA which we have not placed on other agencies. In other words, we have required them to carry out in a more extensive way supervision of listening in practices.

That would be the normal way we would handle anything.

Senator LAXALT. What if they tell you that, "We just do not agree with that." What if a Charles Wick tells Jerry Carmen, "Get lost." What happens then?

Mr. CARR. Well, Jerry Carmen is over in Geneva now, so that does not count.

Senator LAXALT. No, no, I understand; but in the context of the time.

Mr. CARR. The general rule is when there are disagreements between the General Services Administration and any other agency, that that disagreement is then taken to OMB for resolution.

Senator LAXALT. So OMB would be the final arbiter.

Mr. CARR. That is correct, yes.

Now, I would make one other point regarding the regulations. There were a number of questions raised as to the efficacy of the regulations, being a toothless tiger, not being implemented by agencies.

I do not think that you measure the regulation against the kind of evidence that was brought up here. I think what you really have to do is take a look at what, in fact, has been the impact of the regulations on agency practices. You literally have to put yourself back in the 1977-78 timeframe and look at the practices at that point in time. There is a great deal more listening in, if you will, in kind of a free-for-all manner than has taken place since then.

Senator LAXALT. What triggered your having to move forward here in 1977? Was there some particular incident that triggered it? Was it just a matter of general practice that everybody was taping everybody, with or without permission, and something should be done? What triggered it, historically?

Mr. CARR. I guess the really historical trigger goes back before my time. It goes back to Secretary Kissinger's recording of conversations and transcribing of conversations by his secretary, but that preceded my involvement.

During the period that I became involved in this, there were a number of concerns from various privacy groups, for example, not just in the telephone listening area, but in general, with things like the FBI's NCIC, the whole question of privacy and how information technology, either in the form of telecommunications or computers, might impact privacy.

The specific issue, however, had to do with a service monitoring instance where there was service monitoring, and it was objected to by a number of Congressman. I believe Richard Pryor, Dale Kildee,

and a third gentleman, whose name I just do not remember now, were the ones that triggered, if you will, the move to look at our regulations, see how we might put a more effective set of regulations together—

Senator LAXALT. Did they have oversight over you? Is that how they came to be involved?

Mr. CARR. Yes. At that time, Congressman Pryor headed up the Subcommittee on Information—or, I have forgotten the full name of the subcommittee—but under the House Government Operations Committee; that is how he got into it.

There was a great deal of pressure at that point in time to prohibit or to more closely regulate the acquisition of listening in devices. The emphasis was really on equipment; if you did not buy the equipment, you could not carry out the practice. That turns out to be a very impractical approach to it, because of the way in which technology has changed. You can carry out listening in very effectively using the telephone services of the C&P Telephone Co. without ever buying a piece of equipment today.

So, our whole approach was to turn this around to look at the practice, look at what the general policy was of the administration regarding the practice, and then—

Senator LAXALT. Irrespective of the equipment that was being used.

Mr. CARR [continuing]. Irrespective of the equipment, correct—and then focusing on what exceptions made sense from the standpoint of Government Operations, as far as we were concerned, and then the other exceptions that dealt with criminal investigations and national security.

Senator LAXALT. Do you think looking at it—since this has been in effect since 1977, did you say—

Mr. CARR. I believe the regulation was finally issued in 1981.

Senator LAXALT. In 1981. Well, in these 2 or 3 years, do you have any impression, Mr. Carr, after having worked with this thing, I guess, more than anybody else in Government, is it working?

Mr. CARR. Well, the things that I keep looking for are other instances of violations of the regulation, if you will. I think the case of Mr. Wick and USIA is the principal one that I keep hearing over and over again. Keeping in mind that what we are dealing with is consensual monitoring, which literally means there is, generally speaking, more than one person involved in it. If that were an extensive practice, we would be much more aware of that type thing going on.

Senator METZENBAUM. Did you do anything after the House report was made, to check what other agencies are doing? Ms. Toensing said that she did some checking and concluded that the House report was inaccurate. Did GSA do any followup?

Mr. CARR. Our people had looked at the report and reached the same conclusion.

Senator METZENBAUM. That it is not accurate?

Mr. CARR. That it is not accurate. It is not so much just the accuracy. It is focusing on the wrong thing.

Senator METZENBAUM. What did you find?

Mr. CARR. I cannot tell you specifically, because I did not carry it out myself. But the point is that if you were to take any Govern-

ment-wide regulation, not just this one, but any other one, and carry out a survey of the type that was done with this one, you would find about the same kinds of results. In other words, the existence of the regulation itself, as long as the agency itself is aware of it and abides by it—abides by it in the sense that they look at it and say, "Well, we are not going to be doing any listening in, and therefore, we do not need any procedures," that is compliance.

Senator METZENBAUM. Well, I think that there seems to be such a divergence with respect to the facts as to what other Government agencies are doing. Apparently, the GSA did make some survey of the situation. If such a survey was done, and you say very categorically you came to the same conclusion that it was wrong, I think this committee ought to be afforded the results of the study that was made by the GSA.

Mr. CARR. We would be glad to do that.

Senator METZENBAUM. Will you make it available to us, please?

Mr. CARR. Yes, Senator.

Senator LAXALT. We do not have any additional questions, Mr. Carr. We thank you, and we thank the members of the panel.

Mr. CARR. Thank you.

[The prepared statement of Mr. Carr and the GSA survey information follow:]

PREPARED STATEMENT OF FRANK CARR

Mr. Chairman and members of the Subcommittee, I wish to express my appreciation for the opportunity to testify today on S. 2669, a bill to prohibit Government employees from secretly taping conversations with others.

The Federal Telecommunications System (FTS) is under the control and management of the General Services Administration (GSA). Within GSA, these authorities and responsibilities have been delegated to the Office of Information Resources Management. The FTS is the primary system for use by Federal employees in the conduct of Federal government business and includes both the intercity voice network and the consolidated local telephone service. Except for specified exceptions, listening-in or recording conversations on the FTS is prohibited by GSA regulations (41 CFR 201-37.311; formerly 41 CFR 101-37.311).

The regulations permit non consensual monitoring of telephone conversations only when authorized and handled in accordance with the requirements of the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act of 1978. With respect to listening-in or recording of conversations in cases where one party has consented to the interception, exceptions to the general prohibition include, in addition to interceptions for law enforcement monitoring (1) for public safety purposes, (2) to allow a handicapped employee to perform official duties, (3) to monitor the quality of agency service, (4) with the consent of all parties to the conversation, or (5) in accordance with E.O. 12036. Each of the exceptions contains limitations to ensure that monitoring is allowed only when absolutely necessary.

S. 2669 would amend Title 18, United States Code, by adding a new

section covering the interception of Federal employees telephone conversations. The bill, with limited law enforcement and intelligence exceptions, prohibits Federal employees from intercepting or authorizing another person to intercept any conversation to which the employee is a party. The bill makes such an interception a criminal offense by the Federal employee with a penalty of a \$1000 fine, six months imprisonment or both. GSA opposes enactment of this legislation. We are concerned that the bill does not clearly provide for the legitimate needs of Federal agencies for limited listening-in or recording of conversations. While the bill provides that the Attorney General will issue guidelines and regulations permitting interceptions, it is not clear whether these regulations and guidelines will cover law enforcement type activities generally under the Attorney General's purview or will also encompass the mission related activities of those agencies which have legitimate needs for monitoring conversations.

We would like to point out that the proposed bill, although an amendment to the Omnibus Crime Control and Safe Street Act, is applicable only to Federal employees. The statute extends to all persons, not just government officials and employees. This raises the question of why are we limiting this proposal to only Federal employees when the statute prohibits secret interceptions of communications by any person.

This concludes my prepared statement, Mr. Chairman. I would be glad to respond to questions you or other members of the Subcommittee may have.



General Services Administration
Office of Information Resources Management

Washington, DC 20405

JUL 2 1984

Honorable Paul Laxalt
Chairman, Subcommittee on Criminal Law
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Laxalt:

In my testimony before your Committee on June 13, 1984, I indicated that the General Services Administration (GSA) had completed a review of the House Committee on Government Operations' survey of agencies' compliance with the GSA regulation pertaining to the listening-in and recording of telephone conversations (FIRM 201-37.311).

Sixty-nine agencies were surveyed by the committee (the report lists 71; however, the Bureau of the Mint is part of the Department of the Treasury and the Occupational Safety and Health Administration is part of the Department of Labor). Forty-seven agencies responded that they do not listen-in or record telephone conversations. GSA's regulations do not require any actions by an agency in these cases. Six agencies record and monitor telephone conversations for intelligence/investigative applications only. Listening-in and recording of telephone conversations for intelligence/investigative purposes are exempted from reporting to GSA. Five agencies surveyed are not under GSA's regulatory authorities, and six agencies did not respond to the survey. This leaves six agencies responsible for providing GSA with information concerning their listening-in and recording of telephone conversations. Of these, all were in compliance with the regulations, except the United States Information Agency.

We feel that agencies are diligent in implementing the regulation relating to listening-in and recording of telephone conversations. While only 6 agencies were required to comply with the regulations, 14 implemented them and 38 provided policy guidance within their agency.

I believe the above summary clarifies my response to Senator Metzenbaum's question regarding what we found in our follow-up of the House report.

Sincerely,

A handwritten signature in cursive script, reading 'Frank J. Carr'.

FRANK J. CARR
Assistant Administrator

Senator LAXALT. Now, we will proceed to hear from our second panel. As I indicated in my previous statement, we have Prof. Leon Friedman, who is representing the ACLU. Welcome, Professor.

We have Prof. Herman Schwartz, of the American University Law School. Professor, welcome.

And we have Dennis Hays, President of the American Foreign Service Administration. Dennis, it is good to have you with us.

We understand, if I may, that Professor Friedman has a plane to catch, and we would be pleased to hear from you initially, after Senator Metzenbaum makes an observation or two.

Senator METZENBAUM. My observation is that this committee, or the overall Judiciary Committee and particularly the Antitrust Subcommittee, very much benefited by the wisdom and the judgment of one of our witnesses today, who was formerly a staff member of mine, Professor Schwartz, and we are glad to particularly welcome him today.

Senator LAXALT. We are delighted to have you back, Professor Schwartz. Does it feel any different being down at that end of the table?

Professor SCHWARTZ. Somewhat different. I will answer better when the testimony is over.

Senator LAXALT. Professor Friedman, would you like to proceed first?

STATEMENT OF A PANEL, INCLUDING: PROF. LEON FRIEDMAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY LAW SCHOOL, NEW YORK, ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION; PROF. HERMAN SCHWARTZ, PROFESSOR OF LAW, AMERICAN UNIVERSITY LAW SCHOOL, WASHINGTON, DC; AND DENNIS HAYS, PRESIDENT, AMERICAN FOREIGN SERVICE ASSOCIATION

Professor FRIEDMAN. Thank you very much. I do have a statement, which I would like inserted in the record.

Senator LAXALT. Without objection, it will be so inserted.

Professor FRIEDMAN. And I will try and summarize what the statement says.

The fact of the matter is that recording by Government officials has been going on for some period of time. Mr. Carr mentioned Mr. Kissinger's case, and the Supreme Court, of course, had a very famous Freedom of Information Act case relating to this, and over a period of some 6 or 7 years, Mr. Kissinger's secretary monitored his telephone conversations, recorded their contents either by shorthand or on tape—I am quoting from the opinion—"The stenographic notes or tapes were used to prepare detailed summaries and sometimes verbatim transcripts of Kissinger's conversations."

Senator LAXALT. How did that work? Was it a matter of a secretary being assigned for all incoming and outgoing calls?

Professor FRIEDMAN. Exactly so.

Senator LAXALT. And then, that was in turn recorded on some kind of device?

Professor FRIEDMAN. No. There was a dead key. It was all in shorthand.

Senator LAXALT. So the secretary took it off and transcribed in shorthand.

Professor FRIEDMAN. That is correct.

Now, from Secretary Kissinger's point of view, he felt it was necessary in order to make sure that all the business was being done. He was National Security Adviser, and a lot of people were calling in, and he wanted to follow up on that.

Senator LAXALT. Well, if you know, was it a matter of general knowledge that that type of conversation was being transcribed?

Professor FRIEDMAN. No, it was not, it was not; it certainly was not to most of the people he was talking to. Now, maybe a few of them knew.

Senator LAXALT. But most people assumed, calling a man like Mr. Kissinger in the context of that time, that certainly good office practice would dictate that that conversation be transcribed or recorded?

Professor FRIEDMAN. I would not think so, I would not think so. And the simple answer to the problem is, let him know. I mean, you call 911, and they say, "This conversation is being recorded." What is the matter? And the minute you let anybody know that this is happening, then all these problems simply disappear. The minute a Government official lets people know—and perhaps the IRS should be a little more forthcoming in the way in which this monitoring is done—the minute that notice is given, then of course, you do not violate the law anymore. You do not violate the statute which is being proposed. Everyone knows it is going on. And if there are general regulations in special areas, I agree, the whole business about calling in an ambulance, calling in a hospital, calling in the fire department so that you have information, certainly, on issues of public safety, those are the things that could be covered by general regulation.

And as to any other Government officials, just let people know. Now, perhaps it is not as serious a breach of privacy as recording a conversation in which neither party knows what is going on, but it certainly is a very serious breach of trust or breach of confidence for which a general Federal law seems to me appropriate.

Now, I heard this morning, "Why are you discriminating against Government officials?" I have two answers to that. No. 1, I would agree, and the ACLU is taking the position, that two-party consent should be required across-the-board; that it should apply to private people, as well. And there are 13 States in the United States which have such a law, and one of them is California, from which Mr. Wick apparently came. It is not like this is some new Washington rule that no one else in the rest of the country knows about. This has been the rule, and it is a criminal offense in California and Florida, and as the panel may know, there was an investigation by both the prosecuting authorities in both those States—I think they have declined to prosecute—but these were criminal offenses in both of those places.

Senator LAXALT. You said there are 11 States——

Professor FRIEDMAN. I think there are 13.

Senator LAXALT. Thirteen. Are these with criminal sanctions?

Professor FRIEDMAN. Absolutely, absolutely.

And the world does not fall apart in those 13 States where this kind of practice does not—and I assume that it applies to State officials in those jurisdictions, as well. I see nothing in those laws that would grant any general exemption to State officials in those places. And it seems to me the California government continues to operate in all of its essential functions.

No. 2 is that if Congress does not want to go that far, there is something special about a Government official that would make him slightly different than a private citizen, and let me just show you an example.

Lawyers are prohibited under the Code of Professional Responsibility from recording conversations with their clients or with other lawyers, and the reason is twofold. No. 1, they do have a special position of trust vis-a-vis the people they are talking to, and No. 2, they do have some special power, the sort of bargaining position, between a lawyer and a client or another lawyer is somewhat different. And a lawyer may manipulate a conversation around to something that he wants to hear, so that he will be able to use that against the person that he is speaking to. And it seems to me a Government official is in the same kind of position as a lawyer. He does have some special position of trust when he is dealing with someone from the outside, and he may use the conversation, he may manipulate it around, in order to gain something from it. I think of all those conversations during the Watergate, when Ehrlichman would call up somebody and say, "Do you remember, I had nothing at all to do with this handing over the money, and I had nothing at all to do with X, Y, and Z, and it was all your idea—do you remember that?" And all of this was being recorded, and he was using that later on in order to exonerate himself from some investigation into that particular area.

It seems to me that is the real problem in a situation of that kind. If the Government official is using it for a legitimate governmental purpose, so that the whole thing could be followed up on later on, let him tell the other person, and then the other person will know, and then there is simply no danger about manipulating the whole conversation in a way that will either hurt the other person or benefit the particular Government official.

So my first answer is, fine, let us extend it to everybody, but if you do not, there are some special considerations about Government officials doing this; they are not being discriminated against. It is being done because they do have a special position of trust. They do have a special power position vis-a-vis the people they are talking to, and therefore, it is legitimate to make a Federal law about it.

Let me say this. I think a 1-year felony is an appropriate penalty. I do not think it should be a 5-year felony—I am sorry, a 1-year misdemeanor.

Senator LAXALT. Don't you think Federal employees should have some civil liberties so that they can be punished in other ways short of criminalizing them?

Professor FRIEDMAN. Well, as I read the law, this would make it a violation of the statute generally, and so the civil penalties under 2520 would plug in automatically. In other words, 2520 says any conversation, any intercept, in violation of this chapter leads to

civil penalties. This would be in violation of the chapter, and there are fairly heavy civil penalties which would automatically plug in—\$100 a day, or \$1,000, punitive damages and counsel fees.

Senator LAXALT. I really have not had a chance to talk about this with other members of the subcommittee all that much; we had a short amendment discussion on the floor, and you know what that is all about in the Senate; it is usually around the well—so there has been no serious consideration. But I think probably the central point is the one that was raised by one of the Justice people earlier. Is this kind of conduct so reprehensible that we should attempt to criminalize it? I think that is the threshold question.

What do you think of that?

Professor FRIEDMAN. I think it is serious enough so that there should be sanctions available in appropriate cases, a criminal sanction available in appropriate cases—

Senator LAXALT. What is an appropriate case, in your estimation? How about a routine call that would not be really injurious or harmful, but would be of an eavesdropping nature?

Professor FRIEDMAN. Well, first of all, if someone simply overhears another conversation, there is another subsection of title III which would—

Senator LAXALT. No; I am talking about the two-party call, without any outside interception.

Professor FRIEDMAN. I think you have to leave it to the discretion of the prosecutors, and they are not going to do it unless someone has violated the regulations consistently over a period of time, and then let the prosecutors decide what to do. But I think it should be there—very often, the criminal law is there to express a higher morality, whether or not there are sanctions imposed every time it is violated.

Senator LAXALT. Do you agree at all with the contention of Justice that this would overly burden the system?

Professor FRIEDMAN. I do not, I do not.

There are not a lot of prosecutions under 2511. It already contains a lot of criminal sanctions, and they go to private detectives who wiretap people in a domestic dispute, but there are not a lot of prosecutions brought under title III already.

Senator LAXALT. So I gather from your testimony that you are not concerned that this kind of activity that is prohibited by the proposed legislation would be onerous and unfair—

Professor FRIEDMAN. I do not believe so.

Senator LAXALT [continuing]. Or would be burdensome.

Professor FRIEDMAN. I do not think it would be burdensome; I do not think it is unfair. I think there are special reasons why Government officials should be singled out, although the ACLU position has always been let's have two-party consent down the line, like 13 other States do, and people manage to continue functioning under those circumstances.

Senator LAXALT. Thank you very much, Professor.

Senator Metzenbaum was called out momentarily, and he may have some written questions. If he does, you can expect them.

Professor FRIEDMAN. I would be happy to.

Senator LAXALT. We appreciate greatly your testimony. Go get that plane.

Professor FRIEDMAN. Thank you very much.
[The prepared statement of Professor Friedman follows:]

PREPARED STATEMENT OF LEON FRIEDMAN

My name is Leon Friedman. I am a law professor at Hofstra Law School and a member of the New York Bar. I have taught constitutional law and criminal procedure. I am testifying here today on behalf of the American Civil Liberties Union. I thank the Committee for giving us the opportunity to appear and testify.

The problem that S. 2669 is designed to deal with is the secret wiretapping of telephone conversations by government officials. While the well-publicized case of Charles Z. Wick is on everyone's mind, the problem has been with us for some period of time. As members of this Committee know, Richard Nixon secretly recorded conversations of both persons who were physically present in the oval office and of people calling from outside. Henry Kissinger transcribed practically every official telephone conversation which he had over eight years in office, as described by the Supreme Court in Reporters Committee for Freedom of the Press v. Kissinger, 445 U.S. 136, 141 (1980): "Throughout this period of Government service, Kissinger's secretaries generally monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare detailed summaries and sometimes verbatim transcripts of Kissinger's conversations." The tapes and notes were destroyed.

Other members of the Nixon administration wiretapped outsiders and more often each other. During the Watergate scandal, John Ehrlichman began wiretapping conversations with other government officials in which he would exonerate himself from all wrongdoing and try to place the blame elsewhere. He said to then Attorney General Kleindienst on March 28, 1973: "O.K., now, the President said for me to say this to you. That the best information he had and has is that neither Dean nor Halderman nor Colson nor I nor anybody in the White House had any prior knowledge of this burglary." Book VII, Part 4, pp. 1864-65, White House Surveillance Activities, Statement of Information, Hearings before House Judiciary, Ehrlichman also recorded conversations he had with Herbert Kalmbach, John Dean and L. Patrick Gray.

The ACLU position is that all nonconsensual wiretapping should

be prohibited; that is the law in at least 13 states now. Telephone conversations are an extremely private experience. People may say things on the telephone which are confidential, revealing and embarrassing. They may lie, exaggerate or act out certain notions in their minds. The words they use take on an entirely different meaning if reduced to a cold written record later on. If everything they say is recorded without their knowledge, it is a serious affront to their privacy and dignity.

The existing federal wiretap law does permit one party to a conversation to consent to the wiretapping of the other. But even here there is an exception. Section 2511(d) of Title 18 permits one party consent "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

In other words if one party to a telephone conversation secretly records what the other party is saying and encourages him to reveal an embarrassing fact which he plans to use for blackmail purposes or to gain an economic advantage, then the consent is invalid and the statute has been violated.

When we come to government officials secretly recording private citizens, we have a situation where the power position of the two parties is so unequal and the potential for abuse is so serious, that Congress should step in and take steps to correct the situation. It is difficult to see what legitimate reasons exist for secretly recording and transcribing telephone conversation with outsiders. Secretary Kissinger could surely have taken notes of his discussion with people so he could follow up on the conversations and make sure that government matters were properly handled. More typically a government official will record conversations with others (1) to protect himself (as John Ehrlichman did) by making self-saving statements which the other party may not dispute; (2) to obtain embarrassing admissions or gossip from another party which he can use to his advantage later on. A party may say something that may look like an improper approach but was not intended as such. On a cold record, it may well be embarrassing. Why should a government official with the full power of the state behind

him and with the ability to steer the conversation into areas that will benefit him and injure the other party be allowed to exploit that situation?

The situation with government officials is very much like that involving lawyers. It has long been the rule that it is unethical for lawyers to secretly record conversations with each other or with their clients. ABA Opinion 337 states that secret recordings by lawyers of anyone is unethical, while Informal Opinion 1008 and 1009 (both issued in 1967) prohibit specifically the secret recordings of other lawyers and their own clients. See discussion in Opinion 80-95, Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, reprinted in *The Record*, Vol. 36, No. 8, December, 1981 at 635-36. The only exception is the secret recording of witnesses in a criminal proceeding. The Association of the Bar of the City of New York, in the report cited above, stated that since prosecutors may secretly record the conversations of witnesses if the other party consents, simple fairness should allow defense counsel to do the same.

The reason for the more general prohibition is obvious. Lawyers have special training and special powers. They know that if certain words can be elicited from a party, those words can be used to their advantage later on. If you can obtain an admission from a party (or opposing lawyer) in a commercial dispute, that admission which was drawn out by skillful manipulation may be later used in court proceedings. People are simply unprepared to keep up their guard in an informal telephone conversation, especially when the other person knows where he wants to go.

Precisely the same problem exists with government officials. They too have a unique, special position. They too have special powers. They are also solicited by outsiders. To allow them to use their special position to manipulate a simple telephone conversation to their advantage and record what is said is both unethical and repugnant to the values of a free society.

Senator LAXALT. All right, Professor Schwartz.

STATEMENT OF HERMAN SCHWARTZ

Professor SCHWARTZ. Thank you, Mr. Chairman.

I want to thank you for the opportunity to comment on this issue. I think the issue is actually a rather difficult one. I deviate somewhat from my colleagues and old friends at the ACLU, partly because the issue of consent taping, one-party consent, can come up in a very large variety of situations with different values and different interests at stake. The reason I support this bill very strongly is that I think it is a very good effort to reach one situation, in which I think most of us would think that taping should not be done, which is surreptitious taping by a Government official, for reasons that cannot really be ascribed to any valid Government purpose.

I would like to take just a minute, if I can, to discuss some of those values. First of all, I agree totally and I will simply incorporate by reference Mr. McBrien's comments about eavesdropping not being the same as taping. They really are very different. I have always had problems seeing a real privacy issue, unless one uses the word "privacy" in a somewhat stretched way to deal with the consent situation. The latter is really a breach of trust issue. And the essence of that really is that it is a violation of confidence, it is a violation of what people expect in a decent society. And I think it is terribly important. I think the issue that you raised is precisely the right one: Is this kind of thing a big enough deal to make into a criminal statute?

Senator LAXALT. Yes, what if I call Bill Smith and tell him I want to play some tennis with him on the weekend, and he tapes that conversation. What harm is there if he does not consent?

Professor SCHWARTZ. There is no harm at all, and one of the reasons I support this bill and not the broader bill is I do not think it is wise to extend it to private conversations of that kind or of any kind.

Senator LAXALT. Do you think the conversation in question should be official in character? Is that what you are saying?

Professor SCHWARTZ. I think so, because of the fact that this—

Senator LAXALT. How do you monitor that?

Professor SCHWARTZ. Well, one of the ways that the criminal law operates is by hoping that these things will indeed come to light in one way or another, and they do. And you asked about whether there are other things besides Mr. Wick. There is. Within a week, another report came out. A woman named Ruppe, in another Government agency—

Senator LAXALT. The Peace Corps?

Professor SCHWARTZ [continuing] That is right—taped in order to trap her deputy into making embarrassing and disloyal statements to justify firing him. And somehow, these things keep coming out of the woodwork. As Justice Harlan said, and I think Mr. McBrien was quite right in saying, the decision of the Court went the other way on constitutional grounds. Justice Harlan, not one of the more flaming radicals on the Court at that time, said that what this

thing does is it makes it very hard to have a decent society in which people can speak and talk freely.

Senator LAXALT. I agree with that completely. We get down to what do you do about it, what type of sanction? Is it a moral or a social sanction, as has been pretty much the case in the Wick case, or do we go all the way and make criminals out of these people?

Professor SCHWARTZ. Well, you go all the way and make criminals out of these people if it looks as if nothing else will work. And the fact is, with all due respect to the GSA's regulation and the like, there is no evidence—because this is stuff we do not know is going on until it comes to light, by happenstance, occasionally, and so on—there is very little evidence that this has stopped.

Senator LAXALT. Have we given the GSA approach—which I guess, from the testimony here, has been operative since 1981—have we given that a fair chance, or do we go all the way now and say it is not working, so let's go criminal in this whole area?

Professor SCHWARTZ. Sure, because it clearly did not work with Mr. Wick, it did not work with Mrs. Ruppe, it has not worked with others.

Senator LAXALT. But you know full well, Professor Schwartz—you have dealt with this committee—we certainly cannot enact policy based upon the exceptional case.

Professor SCHWARTZ. It is the exceptional——

Senator LAXALT. It could be that; I do not know.

Professor SCHWARTZ. That is the point. But we do know that Mr. Wick said specifically, "It is not against the law, and therefore, I am going to do it." And there are enough instances of taping to warrant legislation—there seems to be some kind of impulse to do this kind of thing in many, many contexts. We still do not know, really, why Mr. Wick did it. We really do not know why President Nixon did all that taping.

Senator LAXALT. Well, I think without speaking for him and knowing him, he just loves gadgets, and he loves to record. I think during the campaign, he was recording everything all the time. I think it is just his nature.

Professor SCHWARTZ. Well, sure. Even if you love gadgets, and you like to record, if you do things that violate other people's rights, then you should not do that.

Senator LAXALT. He would be the last to argue with that presently.

Professor SCHWARTZ. Well, he was not the last to argue that when he was told that it was against the regulations.

Senator LAXALT. I understand.

Professor SCHWARTZ. You cannot get too much more than a formal opinion of counsel, plus two other comments by people in your agency who have been there a long time.

Senator LAXALT. In fairness to him and a lot of others, if you come from the private world as he did, and you come into this place, you are overloaded with regulations and opinions from counsel and so on, and it is awfully hard to sort them out, let's face it.

Professor SCHWARTZ. It may be hard to sort something out, but if a lawyer tells you that it is against the regulations, with all due respect to Mr. Wick, I find it difficult to know what sorting out is necessary.

Senator LAXALT. I understand, but it could be bureaucratic in character, and God only knows, we have got enough of that. If a lawyer tells you, yes, there is a regulation, but there is no sanction, I think that would indicate to somebody that there is something out there, but it may be purely symbolic in nature.

I am not arguing the Wick case. I am just saying that this is a possible interpretation.

Professor SCHWARTZ. If that is the case, then there ought to be a sanction.

Senator LAXALT. Yes, and then——

Professor SCHWARTZ. In which case, Mr. Wick would not have done it.

Senator LAXALT. I think probably out of this, at least as far as this Senator is concerned, it seems to me if GSA is going to do something, perhaps either GSA or someone else should make provision for some kind of mandatory sanction. I do not know whether it should be a suspension or a fine or whatever, administratively, rather than possibly, at this early point, going all the way and thinking in criminal terms.

Professor SCHWARTZ. Well, this is a misdemeanor, and I think that makes a lot of sense, to take it out of the regular title III. But it should be criminal, when there is a willful violation, as there certainly seems to be in here. I cannot imagine anything more willful, than defying an opinion of counsel. That is what opinions of counsel are for. As anybody who has practiced law knows, there are two kinds of opinions of counsel—those that tell you what you want to know and those that tell you what the law is. This one is the second kind, and he ignored that. And it seems to me that, regardless of whether Mr. Wick is prosecuted or not—although I must say, I found the notion that Mr. Stockman would order Mr. Wick not to do something, and that Mr. Wick like a chastised child who talked in class, to use Ms. Toensing's metaphor, would jump into line and say, "I am not going to do it anymore, teacher," a little bit unlikely.

Senator LAXALT. Well, unless Stockman appeared to have the authority of the President behind him. That might make a little bit of difference.

Professor SCHWARTZ. It might, it might. But then, of course, you do not need Mr. Stockman, then. Then it should be enough to have simply the rule with the President's sanction.

I have a couple of technical comments, and I just want to sum up one thing more, and that is simply to say that there are very many different kinds of situations. There is the informer, who wants to make sure he has some corroborating testimony, who may not be acting directly under the law enforcement officer and the like, and I think there are other situations which the committee may want to address itself to, but which really are much harder than this, and that is why I think one ought to focus on this one.

My technical comments are that I do not really understand quite why there is a reference to security. I do not know what a security officer is. There are definitions in the wiretap statutes for law enforcement, for intelligence. And if something specifically is meant by that that is not self-evident, I think it is necessary to provide

some kind of definition, because otherwise, it is a little confusing as to what it would mean.

Senator LAXALT. I think the Senators have indicated to me, and they have certainly indicated here, that they are wide open in terms of modifications.

Professor SCHWARTZ. Sure. I have problems with the exception for Attorney General guidelines and regulations, particularly if the guidelines are to be kept secret. I do not quite know what would be in those guidelines, and it seems to me that Congress, the committee, if it has something in mind, ought to make a recommendation as to what should go into those guidelines. I think that if there is indeed to be an exception for guidelines and the Attorney General is to consider and balance privacy, I think there ought to be something more than that in the form of the direction. I think it is very difficult for an executive officer to know what to do when he is told simply to consider and balance. It does not tell him how to balance. And it seems to me in a matter like this, I think there ought to be some kind of presumption against taping.

Let me conclude by making a couple of comments on some of the statements by the Justice Department and some others. I do not understand how it unreasonably burdens law enforcement. No explanation was given for that, and there is an exception specifically for law enforcement here. I do not see why the GSA regs do not burden matters. The only possible way that the GSA regs are better is because they are not working terribly well.

And finally, I would simply say that, with respect to the other agencies, I have not studied the Brooks Committee report, but I have the impression that the regulations that are being talked about are regulations that deal not with when the agency is monitoring, but what individual employees can do, and that what is intended is some kind of regulation saying that individual employees can or cannot, apart from whether the agency itself monitors. Therefore, for an agency to say, "We do not have a regulation," is serious, because they are not telling their employees, regardless of whether the agency monitors, not to monitor.

Senator LAXALT. Thank you very kindly, Professor.

Mr. Hays.

STATEMENT OF DENNIS HAYS

Mr. HAYS. Thank you, Mr. Chairman.

My name is Dennis Hays, and I am the president of the American Foreign Service Association, and sir, with your permission, I would like to submit my written statement and make a few comments on earlier testimony, and then my central points.

Senator LAXALT. Without objection, so ordered.

Mr. HAYS. Thank you.

Perhaps the most incredible thing I heard today was the testimony of Ms. Toensing, where she said that one of the reasons that she opposed this bill is that it discriminates against Federal employees. I cannot speak for all Federal employees, but I can speak for the 12,000 men and women of the Foreign Service, and I can tell you that we strongly support this legislation. We believe that it is in

our interest to have this protection, and we urge the Congress to act favorably on it.

Second, I was concerned at what I felt was a fair amount of nit-picking on the specific types of exceptions that would take place here. We also strongly believe that the legitimate needs of Federal employees in intelligence work, in security, in public safety and these sorts of things, can be addressed and accommodated and taken care of. There is a bigger issue, a broader issue here, and that is the one that we are trying to address.

Third, the GSA regulations do not work. I think it has been very plainly demonstrated that, with respect to Mr. Wick and the other cases that were mentioned, that the remedies which are there are not sufficient to prevent individuals from undertaking these actions.

And last, I would like to comment on "innocent conversations". That is, as all of us operate on a stream of consciousness, whether on the telephone or not, oftentimes seemingly innocent conversations can turn to statements that might be libelous or inflammatory or security-related or what-have-you, and there is no guarantee that a seemingly innocent conversation may not at any time switch over to something much more serious if the parties involved are not aware they are being taped.

The major point that I would like to make is that there are two issues here. The first one concerns the relationship between the American people and their Government, and I think that has been addressed by some of my colleagues here and yourself, sir.

The second one that I would like to make is that, particularly since it concerns the U.S. Information Agency, we have to be worried about the image and the role of the United States within the world community. The sad fact is that in many nations, surreptitious taping of private citizens by their government is taken as an accepted fact, and in fact, does happen in many places. The citizens of many nations assume this, they take it for granted, and they quite frankly are skeptical that a government would act in any other way. I believe very strongly that the United States stands for something better, that we stand for a free and open society; we stand for a society built on trust and respect, and that our job, as members of the Foreign Service, is to represent America and to expound, to demonstrate, those strengths which we feel make our Nation what it is.

Cases such as this, with the attendant publicity, give comfort and aid to many overseas who wish us ill, who wish to convince themselves and others that the United States is not the representative of the free and open society that, in fact, it is.

So in summation, I would say that these acts are wrong. They are morally and ethically wrong. They are dangerous to the individuals concerned, and perhaps most importantly, they greatly damage us overseas.

Thank you.

[The prepared statement of Mr. Hays follows:]

PREPARED STATEMENT OF DENNIS HAYS

Mr. Chairman, on behalf of the American Foreign Service Association, the professional representative of the career foreign service for 60 years, I am grateful for the opportunity to appear before you today and present testimony in support of S.2669, a bill to prohibit federal government employees from secretly taping telephone conversations with others.

The public has every right to expect ethical and lawful behavior on the part of its elected and appointed officials, and to be assured that violations will be punished by appropriate means. We have recently witnessed an episode, however, that threatens the credibility of not just the individuals involved, but the entire nation. We have learned that Mr. Charles Z. Wick, Director of the United States Information Agency, regularly recorded telephone conversations over a period of years, in many cases without informing the taped party. Mr. Wick explains his actions as taken in the interest of bureaucratic efficiency and historical necessity, but these cannot justify violations of individual privacy.

Mr. Wick took these actions notwithstanding existing General Services Administration regulations prohibiting recording of phone conversations where all of the parties to the conversation do not give prior consent. According to a GSA report, Mr. Wick was advised by his staff that his actions were inconsistent with these regulations. Nonetheless, he continued to tape or have secretaries listen in and take notes on phone conversations. The fact that an individual can knowingly violate regulations and suffer no adverse consequences points to the need for the bill under consideration.

The reason that Mr. Wick could continue to blatantly violate GSA regulations despite warnings from his staff is that, as Mr. Wick recognized, the regulations have "no teeth." Unless Congress enacts legislation to make violation of these regulations punishable, government officials will be able to ignore these prohibitions.

As representatives of the United States Foreign Service, we are particularly sensitive to the effect of Mr. Wick's actions on the way America is perceived overseas. The men and women of USIA have striven for three decades to create and manage an information agency

that would have international credibility. Mr. Wick presides over the instrument with which the United States government communicates its policies to the rest of the world. The image of the United States will of necessity suffer if we cannot be assured that the highest standards of professionalism and ethical conduct are expected of our elected and appointed officials, and enforced by laws and regulations -- with teeth.

There are circumstances under which recording of telephone conversations by government employees is legitimate. S.2669 recognizes these exceptions and provides for recording for law enforcement, foreign intelligence, counterintelligence, public safety, and other purposes. In addition, it provides that all parties may agree to tape a conversation. This might be done in the interest of recordkeeping or historical purposes. Apart from these legitimate uses of tape recording, there can be no justification for surreptitious or unconsented taping.

The penalties in the legislation under consideration would provide a deterrent to this unethical and unlawful behavior. We would also urge the Committee to examine legislative provisions to compensate individuals whose privacy rights are violated by federal employees acting in violation of law. A federal employee who is wrongfully taped might well suffer injury to his personnel record as a result of information gained from taped conversations. That individual should have the express right to exercise administrative recourse such as filing a charge with the Merit Systems Protection Board. He should be able to have his file cleansed and be made whole for any injury to his employment status arising from the material wrongfully placed in his record. Similarly, an individual should be able to seek civil relief from the United States government under the Federal Tort Claims Act. Under this procedure, he could obtain money damages to compensate for the violation of his right to privacy. Of course, the individual would bear the burden of proving the extent of damages.

The enactment of this bill will assure the public that their elected and appointed officials will be held to the high standards appropriate to their offices. The very mission of the United States government depends on this assurance, and we urge this Committee to take favorable action on the bill before it.

Senator LAXALT. Thank you very kindly, Mr. Hays.

You speak of, and I think properly so, of the harm that this does us internationally to our image to have the type of publicity we have had. Do you know of any instances where this has occurred in terms of foreigners?

Mr. HAYS. Yes, sir. As a matter of fact, this occurred to us about 2 days ago, and we have requested our people, and we are also going to request USIA, to supply us with any information or editorials or news reports that have occurred in the foreign press, and we would be happy to submit them as soon as they come in.

Senator LAXALT. We would be pleased to have them for the record.

Tell me on the fundamental point, recognizing that all of us deplore this kind of activity, and something should be done, and perhaps the existing situation is not what it might be—do you suggest to this committee that this whole area of activity, irrespective of the content, whether social in character or whatever, should be criminalized?

Mr. HAYS. Yes, sir. We think that both criminal and civil penalties should be exacted, and simply, again, that this activity is wrong, and that something more has to be done to prevent it from recurring; that the existing regulations are not sufficient and will in the future not be sufficient.

Senator LAXALT. I think that is all I have. I thank you very much, Mr. Hays.

Mr. HAYS. Yes, sir, thank you.

Senator METZENBAUM. I had to go to another committee—

Senator LAXALT. Professor Schwartz found several problems technically with your proposed legislation. I do not mischaracterize his position.

Professor SCHWARTZ. I think Senator Metzenbaum used to characterize those as "nit-picking" or "fly specks."

Senator LAXALT. They both completed their testimony and I think essentially indicate that they are in strong support of the proposed legislation; right, gentlemen?

Professor SCHWARTZ. Yes, sir.

Mr. HAYS. Yes.

Senator METZENBAUM. I do not know that I can do much better than that. I rest.

Senator LAXALT. You leave well enough alone?

Senator METZENBAUM. Yes; I leave well enough alone.

Senator LAXALT. I think that is all we have, unless you have something additionally?

Mr. HAYS. No, sir.

Professor SCHWARTZ. No, Senator.

Senator LAXALT. I thank you very kindly in behalf of my colleagues, in behalf of my colleagues and members of the subcommittee. It has been a very helpful meeting.

Senator METZENBAUM. Thank you.

[Whereupon, at 11:35 a.m., the subcommittee was adjourned.]